Supreme Court, U.S.
FILED

No. 09-688

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In The
SUPREME COURT OF THE
UNITED STATES

TIMOTHY D. POPE,

Petitioner,

v.

STATE OF ALABAMA, ALABAMA DEPARTMENT OF CORRECTIONS, the ALABAMA STATE PERSONNEL DEPARTMENT, JACKIE GRAHAM, in her official capacity as Director of the Alabama State Personnel Department, and RICHARD F. ALLEN, in his official capacity as Commissioner of the Alabama Department of Corrections,

Respondents.

On Petition for a Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In *Martin v. Wilks*, 490 U.S. 755 (1989), this Court held that the plaintiffs were not barred from challenging race-based employment decisions made pursuant to a judicial decree in a prior case. Here, the court below nonetheless held that a race-based employment decision passed muster under this Court's strict scrutiny test precisely *because* it was made pursuant to a judicial decree in a prior case (even though the relevant portion of the decree was eventually dissolved because it required unconstitutional acts). Did the court below err?

2. Does following the aforementioned judicial decree, which specifically precluded hiring non-African Americans unless certain African Americans declined the position, constitute a legitimate, non-discriminatory reason for refusing to hire the non-African American under Title VII?

3. Are the factual findings and conclusions from a court decision more than thirty years earlier adequate to demonstrate the manifest imbalance in a traditionally-segregated job category required by *Johnson v. Transportation Agency*, 480 U.S. 616 (1987)?

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DECISIONS OF THE COURT BELOW

The decision of the District Court in this matter can be found at 2008 WL 2874483. The opinion of the Eleventh Circuit Court of Appeals is unpublished. The order denying the petition for rehearing en banc is also unpublished.

JURISDICTION OF THIS COURT

The opinion of the court below was filed on July 17, 2009. A timely petition for rehearing was filed, and it was denied on September 11, 2009. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, states:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The facts of this matter are set forth in the complaint, most of the allegations of which were admitted by defendants in their answers and none of which were refuted by them in their motion for dismissal and/or summary judgment.

A. Pope's Promotion And Its Rescission

Plaintiff Timothy Pope is a white male who, in 2002, was employed as a Correctional Officer I for the Alabama Department of Corrections. In August 2002, while working at the Draper Correctional Facility in Montgomery County, Alabama, he received notice that his name was on

a certificate of eligible candidates promulgated by respondent Alabama Department of Personnel for a position as Correctional Officer II in Bibb County. He was asked to, and did, contact the warden at Bibb County to express his interest in the open position, which represented a promotion for him. A50 (¶¶ 9-10), A61 (¶¶ 9-10), A112 (¶¶ 1-2). (All "A__" citations are to the accompanying appendix.)

On or about September 3, 2002, Pope interviewed for the position. The panel interviewing him was led by Warden Cheryl Price, a black female, and two Captains at the Bibb facility, one white and one black. A51 (¶ 11), A61 (¶ 11), A112-13 (¶ 3).

On September 19, 2002, Warden Price offered the position to Pope, and Pope accepted. The position was to begin on October 5, 2002, and Price's assistant, Jacqueline Owens, sent him congratulations shortly thereafter. A51 (¶ 12), A58, A61-62 (¶ 12), A113 (¶ 4).

Plaintiff lived approximately eighty (80) miles from the Bibb Facility. Accordingly, in the next few days, he broke his lease (at some financial cost), and executed a new lease on a dwelling in the Birmingham area. A51-52 (¶ 13).

On September 25, 2002, after Pope completed his relocation, Warden Price contacted the plaintiff by telephone and rescinded the offer of promotion.

Price explained that the State Personnel Department precluded the Corrections Department from hiring a white male. Subsequently, Pope emailed the Office of the Attorney General complaining about the matter, and the Corrections Department's General Counsel, Andrew Redd, responded in writing in a letter dated December 4, 2002. Mr. Redd conceded that Pope had been selected as the most qualified candidate by Warden Price, but explained that the Personnel Department had rejected Pope's promotion because it was not in compliance with a judicial order in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) that "does not permit the promotion of a lower-ranking certified white candidate over a higher ranking black candidate" except under narrow circumstances (the "no bypass rule"). A52-54 (¶¶ 14, 16), A62 (¶¶ 14, 16), A69 (¶ 16), A113 (¶ 5).

Plaintiff filed a complaint with the EEOC in October 2002 and received a notice of right to sue in December 2002. A54 (¶ 17), A62 (¶ 17), A69 (¶ 17), A113-14 (¶¶ 6-7). He filed this action in the District Court on February 21, 2003 against the State of Alabama, the state Departments of Corrections and Personnel, and the heads of those departments (the "State Defendants"). A6, A66-72, A114 (¶ 8).

B. The *Frazer* Litigation

A few days later, Pope moved to intervene in the *Frazer* litigation in order to procure an order

terminating the no bypass rule. *United States v. Flowers*, 2007 WL 2725264, *1 (M.D. Ala. Sept. 17, 2007), *aff'd*, 2008 WL 2440028 (11th Cir. June 18, 2008), *cert. denied*, 129 S. Ct. 763 (2008). The *Frazer* litigation had been commenced by the United States in 1968, seeking an injunction requiring Alabama state agencies receiving federal financial assistance to conform to the non-discrimination conditions attached to that assistance. *United States v. Frazer*, 317 F. Supp. 1079, 1081 & n.1 (M.D. Ala. 1970). Among the findings the court made at that time was that the State of Alabama's hiring practices generally utilized examinations. Those who passed the examinations were placed on a register of eligibles for the position in question, and were ranked on that register based upon their grades (as modified by a veterans' preference). *Id.* at 1085. The State then followed the "rule of three," under which "the appointing authority need not select the highest ranking individual available, but must select one from among the top three." *Id.* Alternatively, appointing officers could cancel the certificate if they preferred not to hire any of the three. *Id.* at 1086.

The district court in *Frazer* found that the defendants (which included members of the Alabama State Personnel Board and the head of the Personnel Department) had passed over qualified African American applicants for lower-ranking whites. *Id.* Accordingly, part of the remedial order

entered by the *Frazer* Court in 1970 was that "Negro applicants shall be appointed to positions . . . when [they] are listed on a Certification of Eligibles, unless higher-ranking white applicants on the certificate are appointed to fill the vacancy . . . or unless the defendants determine that the Negro applicant is not qualified to perform the duties of the position, or is otherwise not fit for the position." It further precluded the defendants from "appoint[ing] or offer[ing] a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable." *Id.* at 1091.

Under this no bypass rule, appointing officers retained their discretion (1) to hire a better qualified but lower-ranking non-white (African American, Asian American, non-white Hispanic, etc.) over any higher-ranking applicant (including an African American) or (2) to hire a better qualified but lower-ranking white over any non-African American. But they lacked the discretion to hire a better qualified but lower-ranking white applicant over a higher-ranking African American applicant (short of the African American applicant being entirely unqualified, unfit, or unavailable).

In 1976, after the heads of other state agencies (including the Department of Corrections) were added as defendants, the *Frazer* Court made further findings of discrimination. *United States v. Frazer*, 1976 WL 729 (M.D. Ala. Aug. 20, 1976). In its remedial order, the court reaffirmed all of the provisions of the 1970 decree, *id.* at *6 (¶ 2), but it did not extend those provisions (including the no bypass rule) to any of the new defendants (including the head of the Department of Corrections).

According to the State Defendants, they suspected in early 2002 (some months before they offered, and then rescinded, a promotion to Pope) that the no bypass rule was no longer constitutional. The Personnel Department retained several experts in May 2002, and a study was completed, and an initial draft report written, in August and September 2002. A108 (¶¶ 4-5). After the Personnel Department consulted with the United States about the results of this study, the United States and the *Frazer* defendants jointly moved in May 2003 for an order terminating the no bypass rule. A109 (¶ 10); *United States v. Flowers*, 372 F. Supp. 2d 1319, 1323 (M.D. Ala. 2005). (This was approximately three months after Pope had filed his motion to intervene to seek the same result. After that motion was granted, in January 2004, Pope filed his own complaint and motion to terminate the no bypass rule. *United States v. Flowers*, 2007 WL 2725264, *1 (M.D. Ala. Sept. 17,

2007).)

The *Frazer* Court eventually treated the motions to terminate as preliminary injunction motions seeking to temporarily enjoin the no bypass rule. *United States v. Flowers*, 372 F. Supp. 2d 1319, 1324 (M.D. Ala. 2005). (Although now known by the name just cited, because of a change in the relevant state official, the parties in this case have continued to refer to the litigation in which the no bypass rule was ordered as the *Frazer* litigation. A5 n.1.) On May 20, 2005, the court issued an opinion and order preliminarily enjoining the no bypass rule. The court concluded that the *Frazer* defendants and Pope had established "a significant change . . . in factual conditions [and] in law." *Id.* at 1325 (*quoting Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992)) (brackets and ellipsis as in *Flowers*). As to the latter, the court found that the no bypass rule was "race-conscience [sic], indeterminate, [and] across the board" and was "on its face, unconstitutional." *Id.* at 1326.

In September 2005, the *Frazer* defendants moved for summary judgment on the question of terminating the no bypass rule. The *Frazer* defendants did not rely solely on their expert reports or changed factual circumstances for this motion. They also asserted that "even if the Court determines that a compelling governmental interest exists, the no bypass rule remains facially unconstitutional because it is not sufficiently

narrowly tailored in that it lacks any durational limit or provision for court review or reauthorization; it is inflexible in its application; and it has an intolerable impact on innocent third parties." A77-78 (¶ 4). *See also* A89 ("In other words, after *Croson*, the Supreme Court's position on affirmative action was sufficiently settled to provide the grounds for modification under *Rufo* and Rule 60(b) for changed legal circumstances."), A84-85, A89-106 (arguing that the no bypass rule was not narrowly tailored because of its duration, inflexibility, and effect on innocent third parties).

The *Frazer* court granted the motions to permanently terminate the no bypass rule in June 2006. *United States v. Flowers*, 444 F. Supp. 2d 1192, 1194 (M.D. Ala. 2006).

C. Proceedings In The Courts Below

After the permanent termination of the no bypass rule, the litigants in *Pope* returned to that case. (They had temporarily suspended activity in the case while the future of the no bypass rule was litigated in the *Frazer* litigation. A8 n.3.) On April 9, 2008, the defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) and/or for summary judgment pursuant to Rule 56. A111-21. Given their position in the *Frazer* litigation – particularly that the no bypass rule was not narrowly tailored because, *inter alia*, it lacked any durational limit, was inflexible in its application,

and unduly affected innocent third parties, and that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) created a standard for constitutionality that required modification of the rule – the State Defendants did not try to argue that the no bypass rule met strict scrutiny in September 2002, when they rescinded Pope's promotion on racial grounds. Rather, the sole basis for their motion was something they called the "collateral bar doctrine," which they derived from this Court's decision in *GTE Sylvania, Inc. v. Consumers Union of the U.S.*, 445 U.S. 375 (1980). A117 (¶ 17) ("In sum, the collateral bar doctrine embodied in *GTE Sylvania* operates as a complete defense to Pope's claims").

Accordingly, the State Defendants made no effort to show that the undisputed facts demonstrated a compelling interest in remedying the continuing effects in 2002 of past discrimination, as would have been their burden had that been a basis for their summary judgment motion. *Johnson v. California*, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden . . . "); *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007) ("In order to satisfy this searching standard of review [*viz.*, strict scrutiny], the school districts must demonstrate that the use of individual racial classifications in the assignment plans here is 'narrowly tailored' to achieve a 'compelling' government interest"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (moving party on

summary judgment bears burden of apprising the court the basis for its motion and the evidence on which it relies).

The district court granted defendants' motion for summary judgment, albeit not on the "collateral bar" doctrine espoused by the State Defendants. To the contrary, the district court correctly found that *Martin v. Wilks*, 490 U.S. 755 (1989) had "rejected the 'impermissible collateral attack' rule and allowed the Caucasian firefighters to litigate the merits of their Title VII and equal protection claims." A13. Nonetheless, the district court ruled that the existence of the *Frazer* decree was dispositive because "no matter which statutory highway Pope travels in his endeavor to reach intentional discrimination, be it § 1983 or Title VII, the State Defendants' adherence to the court-ordered no bypass rule is a roadblock to recovery . . . ." A19. As to the Equal Protection Clause and Section 1983, and relying upon an earlier Eleventh Circuit decision (*Citizens Concerned About Our Children v. School Bd. of Broward*, 193 F.3d 1285 (11th Cir. 1999)), which itself had relied upon *GTE Sylvania*, the district court held that complying with the *Frazer* decree was itself a compelling governmental interest. A19-A23. (The district court also noted a second compelling interest, to wit, the remedying of the discrimination in the 1960's and early 1970's identified in the *Frazer* decisions. A22-23 n.7. The district court did not analyze whether the no bypass rule was narrowly-

tailored to achieve that interest.)

The district court further found that denial of the promotion to Pope was narrowly-tailored to achieve the goal of compliance with the no bypass rule because it was "the only choice available." A23.

As to Title VII, the district court, curiously enough, did not directly rely upon *GTE Sylvania* and the State Defendants' compliance with the no bypass rule. Rather, it concluded that there was "no dispute that race was 'taken into account' in the decision to deny Pope the promotion." A29. It then concluded, relying on this Court's opinion in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), that compliance with the court order was "a legitimate and nondiscriminatory reason for taking an adverse employment action." A30. In considering *Johnson*'s two-part inquiry into the legitimacy of an affirmative action plan – *viz.*, that there be a manifest imbalance in a traditionally segregated job category and that the plan not unnecessarily trammel the rights of nonminorities – the district court concluded that the findings of fact in *Frazer* were sufficient, by themselves, to meet the first part of the inquiry. A32-34. The district court then found that the no bypass rule did not "unnecessarily trammel" the rights of nonminorities. A34-35.

Pope appealed the final judgment dismissing his case to the Eleventh Circuit, which affirmed

that judgment. The Eleventh Circuit essentially agreed with the district court that compliance with a judicial order constituted a compelling governmental interest for Equal Protection Clause purposes. A43. The court offered no reason based in the statutory text or Title VII case law why compliance with the *Frazer* decree would undermine a claim for discrimination under Title VII, but nonetheless affirmed the district court's judgment dismissing that claim. *Id.* The Eleventh Circuit rejected Pope's petition for rehearing en banc. A46.

REASONS FOR GRANTING THE PETITION

This case gives this Court an opportunity to resolve the tension in three of its opinions: *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980), *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), and *Martin v. Wilks*, 490 U.S. 755 (1989). *See, e.g., Frederick County Fruit Growers Ass'n v. Martin*, 968 F.2d 1265, 1271-72 (D.C. Cir. 1992) (noting, but expressing no opinion concerning, "any possible tension between *Martin v. Wilks*, which might require that the growers be given an opportunity to establish that the Secretary [of Labor] is denying them their legal right to an interpretation of the 1978 regulation that is not arbitrary and capricious, and *GTE Sylvania v. Consumers Union*, . . . which suggests that the Secretary's compliance with a court order would be a complete defense to such a

claim.").

As shown above, the court below essentially resolved any tension among these cases by greatly limiting the kinds of relief that a party can obtain in the independent lawsuit suit authorized by *Martin v. Wilks*. In essence, the court below held that a party not bound by an earlier court order can challenge that order in a subsequent suit, but can obtain nothing more than reformation (or rescission) of the earlier order. That is, the court below reduced the independent action authorized by *Martin* into an alternative equivalent to moving to intervene and seeking a modification of the order pursuant to Rule 60(b), Fed. R. Civ. P. While this is one possible way of resolving the tension between these cases, it is not the only one (nor, Pope believes, the best one) that the lower courts have reached in cases where conduct taken pursuant to a prior order is challenged. This Court should grant the petition to resolve the split in how such suits have been handled in the circuit courts.

Finally, the court below appears to have adopted the district court's view that 30-year-old findings of past discrimination are sufficient to demonstrate the "manifest imbalance" required by Title VII for engaging in race-conscious remedial employment decisions. (The court below offered no additional reason beyond the district court's analysis for dismissing the Title VII claim, and thus appears to have adopted that rationale.) This, too,

creates a circuit split that this Court should resolve.

I. THIS COURT SHOULD RESOLVE THE AMBIGUITIES IN ITS CASES OVER THE EFFECT OF A JUDICIAL ORDER THAT REQUIRES CONDUCT THAT WOULD OTHERWISE LEAD TO LIABILITY

The courts below (and the State Defendants) have emphasized that parties are required to obey judicial orders. That much is certainly true. The different question in this case is whether any party can be liable for conduct taken pursuant to a judicial order that causes harm to an innocent third person. This Court's precedents do not yield a clear answer to that question.

In *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980), this Court considered whether an injunction in a different lawsuit, precluding the Consumer Product Safety Commission ("CPSC") from disclosing certain documents, required the dismissal of a lawsuit under the Freedom Of Information Act ("FOIA") seeking production of those documents from the CPSC. Noting that the FOIA statute only gave courts the authority to order the production of records "improperly withheld," *id.* at 384 (*quoting* 5 U.S.C. § 552(a)(4)(B)), this Court held that the documents in question were not "improperly" withheld because (1) that term referred to the improper exercise of discretion, and (2) in obeying

a court order, the CPSC had not exercised the kind of discretion to which the statute referred. *Id.* at 386. This Court also stated that its interpretation of "improperly" was "further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed." *Id.* Finally, this Court held that its interpretation of "improperly" was correct because "there is nothing in the legislative history to suggest that in adopting [FOIA] . . . , Congress intended to require an agency to commit contempt of court in order to release documents." *Id.* at 387.

Thus, this Court in *GTE Sylvania* interpreted only FOIA, and only the primary remedy that FOIA affords the public: an order requiring disclosure of documents. This Court did not address, for example, whether the FOIA requesters would be entitled to attorneys' fees if the prior order were later dissolved or reversed and the documents produced.

In *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), this Court began to address whether any kind of liability might be imposed on those following court orders. The Equal Employment Opportunity Commission ("EEOC") had investigated W.R. Grace's employment practices and concluded that there was reasonable cause to believe that Grace had discriminated against women and African Americans in violation

of Title VII. The EEOC also concluded that Grace's seniority system, mandated by a collective bargaining agreement, was also unlawful. *Id.* at 759. The EEOC and Grace entered into a conciliation agreement that required the company to prevent men from exercising shift preference seniority to displace women with less seniority, and to maintain the proportion of women in its plant in the event of layoffs, even though both provisions required the company to deviate from its collective bargaining agreement. *Id.* at 760.

A district court upheld the provisions of the conciliation agreement and concluded that they were "binding upon all the parties to this action" and that, with regards to any conflict between the collective bargaining agreement and the conciliation agreement, "the provisions of the conciliation agreement are controlling and all parties to this action shall abide thereby." *Id.* at 761 n.2. More employees were subsequently laid off, and, pursuant to the district court's order, Grace followed the terms of the conciliation agreement. When the court of appeals reversed the district court, Grace restored the laid off men to the positions to which they were entitled under the collective bargaining agreement. Male employees sought backpay in arbitration, including for the layoffs that occurred after the district court's order. Although the first arbitrator ruled that the male employee should be denied backpay because "it would be inequitable to penalize the Company for

conduct that complied with an outstanding court order," *id.* at 762, a subsequent arbitrator ruled to the contrary with respect to other male employees and ordered backpay. Although the latter arbitrator "accepted [Grace's] contention that it had acted in good faith in following the conciliation agreement," he "[i]n essence, . . . interpreted the collective-bargaining agreement as providing that the District Court's order did not extinguish the Company's liability for its breach." *Id.* at 763-64.

Giving deference to the second arbitrator, this Court upheld his awards. This Court specifically considered whether enforcement of the awards would offend public policy, and it stated that "[i]t is beyond question that obedience to judicial orders is an important public policy," and that "[a]n injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn." *Id.* at 766. Moreover, this Court assumed (despite its own reservations) that the district court order was the equivalent of an injunction. *Id.* at 768 n.11. It nonetheless held that the arbitrator did not require anyone to violate the District Court order because it "neither mandated layoffs nor required layoffs be conducted according to the collective-bargaining agreement." *Id.* at 768-69. Rather, "[t]he award simply held, retrospectively, that the employees were entitled to damages for the prior breach of the seniority provisions." *Id.* at 769. This Court concluded that "placing the Company in this position with respect

to the court order [is not] so unfair as to violate public policy" because "[o]beying injunctions often is a costly affair." *Id.* at 770. This Court noted that losses were bound to occur given the alleged prior discrimination against women, and "[t]he issue is whether the Company or the Union members should bear the burden of those losses." *Id.*

Thus, one of the questions left open by *GTE Sylvania* – whether a litigant can ever be liable for conduct required by a court order – was answered in the affirmative in *W.R. Grace*. To be sure, this Court relied upon the unique circumstances of the case, including the company's own behavior in entering into a conciliation agreement inconsistent with its collective bargaining agreement obligations, and its failure to seek a stay from the district court pending review by the court of appeals. *Id.* at 767, 769. But it did not hold that such "voluntary" assumption of risk (in the face of an EEOC investigation and finding), or such a failure to seek temporary relief, was needed to uphold a non-contempt remedy for the harms caused by obeying a court order. *Id.* at 767 n.9.[1]

Finally, in *Martin v. Wilks*, 490 U.S. 755 (1989), this Court held that the existence of a

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[1] Here, as noted, the State Defendants did nothing at all to seek modification or termination of the no bypass rule for at least thirteen years after this Court's decision in *Croson*, which unambiguously adopted the strict scrutiny standard for race-based preferences.

consent decree did not preclude those adversely affected by that decree (but not involved in the litigation in which it was entered) from challenging the conduct required by the decree. The plaintiffs' claim in *Martin* was that "the City [of Birmingham] and the [Jefferson County Personnel] Board were making promotion decisions on the basis of race in reliance on certain consent decrees, and that these decisions constituted impermissible racial discrimination in violation of the Constitution and federal statutes." *Id.* at 758. The district court had held that the plaintiffs "were precluded from challenging employment decisions taken pursuant to the decrees," and this Court held that this holding "contravene[d] the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 758-59.

Thus, the opening paragraph of *Martin* certainly suggests that plaintiffs there were *not* limited (contrary to the apparent interpretation of the lower courts in this case) to seeking a prospective injunction against the continuation of the consent decrees. Rather, the plaintiffs' challenge in *Martin* was to employment decisions made *in the past* pursuant to the decree, and the district court had precluded them from challenging those past decisions. *See also id.* at 760 ("The Board and the City admitted to making race-conscious employment decisions, but argued that the decisions were unassailable because they were

made pursuant to the consent decrees."); *id.* at 761 n.1 (noting that the dissenting judge in the Eleventh Circuit had also concluded that the lawsuit was not barred, but "distinguished . . . between claims for prospective relief and claims for backpay, the latter being barred . . . by the City's good-faith reliance on the decrees.").

This Court concluded as follows:

> No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by a decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.

Id. at 767. Thus, again, while no specific remedies were discussed, this Court held that it was permitting a challenge to employment decisions that "*were* required by a decree" – *i.e.*, ones that took place in the past. Notably, in this passage, this Court did not distinguish between kinds of decrees (consent, litigated, or some combination of the two). *See also id.* at 788 n.27 (Steven, J., dissenting) ("For purposes of determining whether an employer can be held liable for intentional discrimination merely for complying with the terms of a consent decree, however, it is appropriate to treat the consent

decree as a judicial order. . . . Most significantly, violation of a consent decree is punishable as criminal contempt"); *id.* at 791 n.30 ("[T]he reasoning in the Court's opinion today would seem equally applicable to litigated orders and consent decrees."). A21 n.6.

Four justices dissented. Interestingly, the dissenters agreed with the Court that non-parties to a prior litigation could not be barred from challenging decisions made pursuant to a decree entered in that litigation. *Id.* at 769-70 (Stevens, J., dissenting). The dissenters believed, however, that the grounds for challenging the validity of a decree were limited (*id.* at 771, 783), and that a judgment could have a practical effect limiting the non-parties' rights (*id.* at 769-70). As to the latter, the dissenters believed that the District Court had not ruled that the plaintiffs were *barred* from challenging actions taken pursuant to a decree, but rather that actions taken pursuant to the decree were not made "with the requisite racially discriminatory intent." *Id.* at 779 n.15; *see also id.* at 782 n.20, 789. After concluding that the record did not support any basis for challenging the decree on the narrow grounds the dissenters believed permissible (*id.* at 783-87), the dissent concluded that the district court had correctly concluded that the decree's existence negated elements of the claim of discrimination. Specifically, the dissenters believed that "the fact that an employer is acting under court compulsion may be evidence that the

employer is acting in good faith and without discriminatory intent." *Id.* at 788. *See also id.* at 790 ("[I]t would be 'unconscionable' to conclude that obedience to an order remedying a Title VII violation could subject a defendant to additional liability.").[2]

This Court responded to the dissent as follows:

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[2] Of course, this Court has long rejected the *Martin* dissent's suggestion that differential treatment is not "intentional discrimination" simply because the actor engaging in such treatment has a reason for doing so that might demonstrate its "good faith." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009) (good-faith fear of disparate-impact liability inadequate to defeat a claim for intentional discrimination); *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII; "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). Indeed, a "good faith" exception to intentional discrimination would render the entire "strict scrutiny" analysis under the Equal Protection Clause pointless; the very purpose of that exercise is to assess the reason provided by the state actor for engaging in racially disparate treatment. *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government.").

> [E]ither the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents' Title VII claims or it is not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

Id. at 765 n.6. This Court, then, did not limit its holding to a rejection of the "no collateral attack" defense. Rather, it equated *any* defense based upon compliance with a decree with binding non-parties to the decree, and it held that such non-parties could not be so bound. It further rejected the dissent's suggestion that there was no intentional discrimination because the employer was acting pursuant to a decree. After remand and a trial in the district court, the Eleventh Circuit concluded that the employment decisions were, in fact, unconstitutional and remanded the case to the district court so that it "should provide appropriate relief." *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1549 (11th Cir. 1994), *cert den.*, 514 U.S. 1065 (1995).[3]

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[3] In Section 108 of the Civil Rights Act of 1991, Congress precluded certain individuals from challenging "an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a (continued...)

Of course, the Court did not specifically hold that compliance with a decree is not a compelling governmental interest, and that was the holding of the court below in this case. But given the tension between its holding and this Court's rationale in *Martin*, and the gaps still remaining from this Court's opinions in *GTE Sylvania*, *W.R. Grace*, and *Martin*, the petition should be granted.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A DISPUTE IN THE LOWER COURTS OVER WHETHER COMPLIANCE WITH A JUDICIAL DECREE IS A COMPLETE DEFENSE TO A CLAIM OF DISCRIMINATION

Several lower courts have precluded any

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[3](...continued)
claim of employment discrimination" (42 U.S.C. § 2000e-2(n)) provided that certain conditions relating to due process with respect to the precluded individuals were met. 42 U.S.C. §§ 2000e-2(n)(1)(B), 2000e-2(n)(2)(D). No one has suggested (and it would be absurd to suggest) that the conditions in that section were met with respect to Pope, or that Pope is precluded from suing because of that section. A14 n.5. Indeed, the decision of the court below seems to render Section 108 entirely superfluous. Since that provision does not alter the standards for intervention (42 U.S.C. § 2000e-2(n)(2)(A)), it primarily precludes challenges to past employment practices implementing certain judgments when its conditions are met. The court below's holding essentially precludes challenges to those practices *regardless* of whether Section 108's conditions are met.

claim for retrospective relief (*i.e.*, relief for past conduct) when state employers are acting pursuant to a prior judicial decree. Others have permitted plaintiffs alleging racial discrimination based upon such conduct to obtain that relief. This Court should grant the petition to resolve this split.

Thus, for example, the court below relied upon the Eighth Circuit's decision in *Martinez v. City of St. Louis*, 539 F.3d 857 (8th Cir. 2008). According to the Eighth Circuit, this Court in *Martin* "simply remanded to permit plaintiffs to challenge the decree's validity." *Id.* at 861. Accordingly, the Eighth Circuit held, it was error to "grant[] monetary and equitable relief for the City's hiring decisions before the dissolution of the decree." *Id.*

On the other hand, both the Fifth and Sixth Circuits have permitted plaintiffs challenging past discriminatory employment decisions made pursuant to a judicial decree to seek (and obtain) retrospective relief. Thus, in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), a 1989 consent decree from an earlier lawsuit (entered into after a number of rulings by the District Court) provided that the number of male and female appointments as firefighters would be in proportion to the proportions of males and females passing the entry level test. *Id.* at 395. When men who sat for the firefighter exams in 1990 lost seniority to female candidates because of the consent decree, they sued

alleging that the "the consent decree discriminated against [them] on the basis of their gender in violation of the Equal Protection Clause." *Id.* at 395. After it concluded that the consent decree was indeed discriminatory, the district court ordered adjustments to seniority so that the male plaintiffs were made whole. *Id.* at 396. The Sixth Circuit affirmed that retrospective make-whole remedy. *Id.* at 412-13.

Similarly, in *Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006), the Fifth Circuit considered a claim by white firefighters that a hiring process adopted pursuant to a 1980 consent decree discriminated against them when they applied for positions between 2000 and 2002. The 1980 decree had an interim hiring goal of requiring at least 50% of all vacancies to be filled by qualified black applicants and 15% to be filled by qualified female applicants. *Id.* at 452. All agreed that the City's hiring process "was adopted solely to comply with the goals of the decree." *Id.* at 454. Although the Fifth Circuit concluded that there was adequate evidence of past discrimination to support the entry of the consent decree in 1980, it also held that issues of fact remained over whether past discrimination still warranted a race-conscious remedy when the plaintiffs were denied employment in 2000 and 2002. *Id.* at 455-58. (Conspicuously, it did *not* suggest that evidence of whether such remedies were needed in 2004, when the district court had ruled, or in 2006, at the time

it was writing, was relevant.) Nor did the Fifth Circuit's narrow-tailoring analysis suggest that the only relevant consideration was whether the City's hiring process was required to comply with the consent decree. To the contrary. *Id.* at 459 (that strong remedial measures were needed "may have been true in 1980. . . . [But] [t]o the extent the district court focused on whether the remedies were necessary in 1980, instead of between 2000 and 2002, it erred.")

The Fifth Circuit also held that the hiring process violated Title VII, and specifically 42 U.S.C. § 2000e-2(l) (prohibiting the use of separate cut off scores). *Dean*, 438 F.3d at 463. It remanded the case "for further proceedings concerning the entitlement of each individual [plaintiff] to relief." *Id.* at 465.

It is clear that the lower courts take different approaches to the use of judicial decrees as a defense to claims of discrimination. This Court should grant the petition to resolve this dispute.

III. THIS COURT SHOULD RESOLVE OTHER CONFLICTS RAISED BY THE ANALYSIS OF THE COURT BELOW

Three other anomalies and/or conflicts are raised by the analysis of the court below. The need to resolve each of these issues further militates in favor of granting the petition.

First, under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992), decrees should be modified when "one or more of the obligations placed upon the parties has become impermissible under federal law." Under the analysis of the court below, though, complying with an obligation of a consent decree is always permissible (since it meets strict scrutiny). This, of course, cannot be because it would mean that decrees could never be modified. And if the court below held only that compliance with a judicial decree is compelling for *past* (and not future) conduct, the question then becomes why.

Second, the decisions of the courts below demonstrate the tension between *Johnson v. Transportation Agency*, 480 U.S. 616 (1989) and *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The district court held that "there is no dispute that race was 'taken into account' in the decision to deny Pope the promotion," but nonetheless held that "compliance with a court order is a legitimate and nondiscriminatory reason for taking an adverse employment action" under the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A29-30 (*citing Johnson*, 480 U.S. at 626). But *Thurston* held that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination," *Thurston*, 469 U.S. at 121, and surely the no bypass rule and its application here -- sufficient to demonstrate that

"race was 'taken into account'" – constitutes direct evidence. Characterizing compliance with a race-conscious decree as a "nondiscriminatory reason" (as opposed to a defense for clearly discriminatory conduct) makes no sense at all. *Cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009) ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense.").

Third, to the extent that the courts below held that reliance upon the judicial findings of discrimination in the 1960's and 1970's constituted an adequate basis for upholding a discriminatory decision made in 2002 made pursuant to a judicial decree, their conclusion is inconsistent with other circuit courts. *Compare* A22-23 n.7 and A33 ("[T]he court finds that the prior determination of past discrimination by the *Frazer* court satisfies the *Johnson* inquiry that the remedial action be supported by a manifest imbalance") *with Brunet*, 1 F.3d at 409 ("the discriminatory policy against women in the Columbus fire department prior to 1975 is too remote to support a compelling governmental interest to justify the affirmative action plan embodied in the [1989] consent decree") and *Hammon v. Barry*, 826 F.2d 73, 77 (D.C. Cir. 1987) (policy of segregation in the fire department in the 1950's did not support a race-conscious hiring program in the 1980's; "something more recent should serve as a predicate for remedial action *right now*") (emphasis in original).

IV. THE PROPER INCENTIVES FOR ELIMINATING OLD DECREES IS AN IMPORTANT ISSUE THAT DESERVES THIS COURT'S ATTENTION

In the end, the courts below (as well as the defendants) believed that it was improper to "punish" the defendants for following a facially-valid judicial decree. *E.g.*, A38. The problem with this analysis is the notion that defendants would have been "punished" if they were required to pay backpay or provide other equitable relief. They would not be, any more than their obligation to pay Pope's reasonable attorney fees in the *Frazer* litigation constituted "punishment" for having complied with a consent decree. *United States v. Flowers*, 2007 WL 2725264 (M.D. Ala. Sept. 17, 2007) (awarding fees to Pope), *aff'd*, 2008 WL 2440028 (11th Cir. June 18, 2008), *cert. denied*, 129 S. Ct. 763 (2008).

Timothy Pope suffered a loss: he was denied a promotion because he was white. The question in this case, and scores of other cases in which old judicial decrees are used as a "defense" is who should bear that loss, Pope or the State? *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770 (1983) ("[t]he issue is whether the Company or the Union members should bear the burden of those losses [resulting from following a district court's order]").

This Court recently has recognized some of the perverse incentives associated with decrees issued as part of institutional reform litigation. *Horne v. Flores*, 129 S. Ct. 2579, 2593-94 (2009). Blanket immunity for any action taken pursuant to a decree is an incentive that runs counter to the long-term goal this Court has stated for such decrees: promptly returning responsibility for discharging a State's basic obligations to the State. *Id.* at 2595. Courts themselves rarely take the initiative to return control to local officials, and, for many government officials, the rule provided by the lower court in this case will militate in favor of delaying any effort to seek a return of that control. *E.g.*, *Hart v. Community School Board No. 1*, 536 F. Supp. 2d 274, 279-80 (E.D.N.Y. 2008) (Weinstein, J.) (NYC Department of Education first seeks termination of a 1974 decree in 2008 after Asian Indians had been denied admission pursuant to decree; court notes that it had previously issued orders in 1990 suggesting that it was undesirable for a federal court to continue supervising a local school district, and in 2000 doubting its continuing jurisdiction, and that the district itself had gone from being "overwhelmingly white" to less than 41% white); *id.* at 284 (after noting that "[t]he court has no jurisdiction over the case," the Court still expresses its concern about rusting gates and the need for paint "to improve the morale of those entering the school").

A contrary rule, one that permitted liability

if the acts in question violated other legal norms, would provide a very modest incentive in the other direction: it would encourage local officials to seek termination or modification of judicial decrees as early as possible. Nor would it expose state and local governments to excessive judgments (especially in comparison to the attorneys' fees to which the lower courts have concluded such defendants are already exposed). In many cases, of course, the fact that a decree is outdated, and should be modified or terminated, does not also mean that the underlying conduct is itself even potentially illegal. Even when it might be, as here, plaintiffs must still demonstrate that the conduct injured them and was illegal at the time of the injury. Here, for example, to prevail, Pope must demonstrate that the no bypass rule was illegal in 2002. In cases where the challenge is made shortly after a litigated decree is entered, such demonstrations obviously will be difficult.

Moreover, in many cases, various immunities likely will apply. Eleventh Amendment immunity provides the States themselves with a defense to compensatory damages except where they have waived that immunity or (as in Title VII) where Congress has abrogated it. Common law quasi-judicial immunity (and/or qualified immunity) may apply to individuals sued in their individual capacity. *E.g.*, *Cooper v. Parrish*, 203 F.3d 937, 950 (6th Cir. 2000) (quasi-judicial immunity applied to investigators effecting a temporary restraining

order).

The continuing existence of old judicial decrees whose propriety is questionable militates in favor of granting this petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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United States District Court,
M.D. Alabama,
Northern Division.

Timothy D. POPE, Plaintiff,
v.
State of ALABAMA, et al., Defendants.
Civil Action No. 2:03cv199-ID.

July 24, 2008.

MEMORANDUM OPINION AND ORDER

IRA DeMENT, Senior District Judge.

I. INTRODUCTION

This cause is before the court on a motion for summary judgment, filed by the State of Alabama, the Alabama Department of Corrections ("ADOC"), the Alabama State Personnel Department ("ASPD"), ASPD's director, and ADOC's commissioner (collectively, "State Defendants"). (State Defs. Mot. (Doc. No. 51)); (*see also* Order (Doc. No. 54) (construing motion to dismiss as one for summary judgment).) The motion is accompanied by a memorandum of law. (State Defs. Mem. of Law (Doc. No. 52).) The State Defendants move for summary judgment on the claims brought

by Plaintiff Timothy Pope ("Pope") alleging that he was denied a promotion based upon his race (Caucasian) through the application of a 1970 court-ordered race-conscious remedy, referred to as the no-bypass rule, which was designed to combat racial bias against African-Americans in the State of Alabama's employment practices. Pope brings his claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII"), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983 ("§ 1983"). Opposing summary judgment, Pope filed a response to which the State Defendants filed a reply. (Pl.Resp.(Doc. No. 56)); (State Defs. Reply (Doc. No. 57).) Because there are no disputed issues of material fact, and after careful consideration of the arguments of counsel, the relevant law and the record as a whole, the court finds that the State Defendants' motion for summary judgment is due to be granted.

II. JURISDICTION AND VENUE

The court exercises subject matter jurisdiction over this action, pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343(a)(3) (civil rights jurisdiction). The parties do not contest personal jurisdiction or venue, and the court finds adequate allegations of each.

III. STANDARD OF REVIEW

A court considering a motion for summary judgment must construe the evidence and make factual inferences in the light most favorable to the nonmoving party. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). At the summary judgment juncture, the court does not "weigh the evidence and determine the truth of the matter," but solely "determine[s] whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) (citations omitted).

Summary judgment is entered only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323. The movant can meet this burden by presenting evidence showing that there is no dispute of material fact or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-23, 325. The burden then shifts to the nonmoving

party, which "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment will not be entered unless the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *See id.* at 587.

IV. BACKGROUND

Pope, a Caucasian male, was denied a promotion with the ADOC based upon the application of a court-mandated remedy. The no-bypass rule, as the remedy has come to be called, was the product of an injunction entered in 1970 in a case tried in this district and originally styled *United States v. Frazer*, No. 2:68cv2709 (hereafter "*Frazer*").[FN1] In *Frazer*, after a trial on the merits, the court found the ASPD and the heads of seven Alabama agencies liable for engaging in a pattern or practice of discriminating against African-Americans through hiring and promotional practices. In an effort to remedy the illegal discrimination, the late Honorable Frank M. Johnson, Jr., who presided over the trial, entered injunctive orders, one of which implemented the no-bypass rule. As recognized by the Honorable Myron H. Thompson, who later inherited the case, "the no-bypass rule was 'imposed in response to evidence that, up until 1970, the State of Alabama was unabashedly refusing to hire and promote African-Americans to almost any and all non-menial positions in state

government because of their race'" and "was part of an extensive remedial order to redress this discrimination." *Frazer,* 2:68cv2709, Op. at 3 (Doc. No. 779) (citation omitted). Distilled to its essence, the no-bypass rule prohibited Alabama state officials from bypassing a higher-ranked African-American applicant in favor of a lower-ranked Caucasian applicant on a certificate of eligibles "unless the defendants determine[d] that the [African-American] applicant [was] not qualified to perform the duties of the position, or [was] otherwise not fit for the position." *U.S. v. Frazer,* 317 F.Supp. 1079, 1091 (M.D.Ala.1970); *see also Frazer,* 2:68cv2709 (M.D. Ala. June 30, 2006) (Op. at 2, Doc. No. 779, discussing the no-bypass rule).

> FN1. The lawsuit's case name now is styled differently, but for continuity, herein, the court refers to the lawsuit as it was known at its commencement.

In 1976, the *Frazer* court extended application of the injunctive orders to all but one Alabama agency. The ADOC was among the state entities which was required to adhere to the no-bypass rule. *See U.S. v. Frazer,* No. 2:68cv2709-N, 1976 WL 729, *1 (M.D.Ala.1976) ("There is no question from the evidence in this case that systematic discrimination against black citizens of Alabama has been as extensive among the new defendants as it had been among the original defendants."). The *Frazer*

no-bypass rule remained in effect until its temporary suspension in May 2005 which was followed by its permanent termination in June 2006. *Frazer,* 2:68cv2709 (Orders, Doc. Nos. 735 & 779).

It is undisputed that Pope was directly and adversely affected by the State Defendants' application of the no-bypass rule. In September 2002, having been interviewed, Pope orally was offered a promotion to the classification of Correctional Officer II, but approximately a week later the offer was "rescinded solely" because of the no-bypass rule in that an African-American employee was ranked higher than Pope on a certificate of eligibles. (State Defs. Mem. of Law at 2 (Doc. No. 52).) In other words, but for the *Frazer* no-bypass rule, Pope would have been promoted.[FN2]

> FN2. The court notes that, according to the State Defendants, Pope was promoted to the position of Correctional Officer II on April 17, 2004. (State Defs. Resp. at 8 n. 5 (Doc. No. 52).)

Seeking individual redress for the forfeited promotion (*see* Pl. Resp. at 11), Pope filed the instant lawsuit on February 21, 2003. Pope brings discrimination claims pursuant to Title VII and the Fourteenth Amendment's Equal Protection Clause, as enforced by § 1983. In his complaint, Pope alleges that the State Defendants discriminated

against him because of his race by applying the *Frazer* no-bypass rule so as to deny him the promotion in September 2002. (Compl. at 4 (Doc. No. 1).) He alleges that the "continuing application" of the no-bypass rule "is an unconstitutional race conscious practice" and is "not narrowly tailored to achieve a compelling governmental interest." (*Id.* at 6.) Furthermore, Pope avers that, "[d]espite the fact that the defendants have been aware of the changes in governing caselaw for many years, they continue to adhere to a practice which they know, or should have known, violates the constitutional rights of non-black employees and job applicants like [Pope]." (*Id.*) As relief, Pope requests a declaratory judgment, an injunction, back pay with interest, "instatement into the position [he] would have held if the defendants had not discriminated against [him] because of race, and compensation for loss of pension and other benefits," as well as compensatory damages, attorneys' fees and costs. (*Id.* at 6-7.)

The State Defendants are the State of Alabama, ADOC, ASPD, Jackie Graham in her official capacity as ASPD's director, and Richard F. Allen in his official capacity as ADOC's commissioner. (*See* Doc. Nos. 1, 45.) The State Defendants filed answers, admitting some allegations, but denying others, and asserting that they, "at all times, were acting pursuant to a court injunction imposed on the State of Alabama in *U.S. v. Frazer,* 317 F.Supp. 1079." (Answer at 5 (Doc. No. 8)); (*accord* Answer at

4 (Doc. No. 9).)

In addition to filing this lawsuit, Pope also participated, *via* a granted motion to intervene, in the proceedings in *Frazer* which led to the retraction of the no-bypass rule. The proceedings in *Frazer* to terminate the three-decade-old no-bypass rule were initiated in May 2003 by the State Defendants. Pope joined their pursuit in January 2004. On May 20, 2005, the court preliminarily enjoined the no-bypass rule. On June 30, 2006, having found a " 'significant change in [factual] circumstances' " and that "termination of the no-bypass rule [was] 'suitably tailored' to these changed circumstances," the *Frazer* court granted the motions to terminate the no-bypass provision of the injunctive orders.[FN3] *Frazer,* 2:68cv2709, Op. at 3 (Doc. No. 779), citing *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992)). The final judgment in *Frazer* pronounces that "[t]he application of the no-bypass rule in this litigation is permanently terminated." *Id.* (Final Judgment at 2, Doc. No. 780).

> FN3. The age of this case is attributable to the stay which the parties requested the court to enter pending the outcome of the *Frazer* court's ruling on Pope's and the State Defendants' challenge to the continued validity of the no-bypass rule. (*See, e.g.,* Pl. Resp. at 2 (Doc. No. 56)); (Order (Doc. No. 12).)

Pope concedes that the *Frazer* court's termination

of the no-bypass rule "provided some of the relief Pope request[s]" in this lawsuit. (Pl. Resp. at 16 (Doc. No. 56).) This concession encompasses Pope's claims for injunctive relief asking the court to terminate the no-bypass rule and to enjoin the State Defendants from enforcing it. (*See id.* at 17.) As the court reads the complaint, Pope pursues the following claims: (1) a Title VII claim alleging a discriminatory failure to promote; and (2) a claim alleging that the no-bypass rule as applied to him in 2002 violated his equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

V. DISCUSSION

The issue is whether the State Defendants are entitled to summary judgment on Pope's equal protection and Title VII claims on the ground that the *Frazer* court-mandated no-bypass rule required the State Defendants to award the promotion at issue to an African-American employee, rather than to Pope. With that said, no claim is made in this case that the State Defendants violated or otherwise exceeded the scope of the no-bypass rule in denying Pope the promotion in 2002. To the contrary, it is undisputed that Pope was denied the promotion because of a correct application of the court-ordered no-bypass rule. Pope, though, says that the State Defendants cannot use the no-bypass rule as a shield to liability. The State Defendants say otherwise.

The principal authority relied upon by the State Defendants is *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375 (1980). The State Defendants argue that to permit Pope "to hold [them] answerable for failing to defy court-ordered affirmative action whose strictures the State vigorously opposed and, when it lost, obeyed," directly contravenes "*GTE Sylvania* and the respect for the judicial process that was upheld in that case." (State Defs. Mem. at 1-2 (Doc. No. 52).)

In *GTE Sylvania,* the Supreme Court of the United States held that a consumer agency did not violate the Freedom of Information Act ("FOIA") by withholding information from the requesters because a federal district court had enjoined the agency from disclosing the information. *See* 445 U.S. at 385-86. In so holding, the Supreme Court reiterated the "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *Id.* at 386; *accord Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 439-40 (1976) ("those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to the order, until it is modified or reversed"); *Citizens Concerned About Our Children v. Sch. Bd.*, 193 F.3d 1285, 1292 (11th Cir.1999) (citing *GTE Sylvania* for the proposition

that "the law considers an enjoined party to have lost the discretion to contravene a court order"). The Court explained that an enjoined party ought not be put in a position of having "to commit contempt of court" in order to comply with a FOIA request and that to hold that an enjoined entity acts "improperly" in lawfully obeying a valid court order "would do violence to the common understanding of the term 'improperly.' " *GTE Sylvania, Inc.*, 445 U.S. at 387.

The State Defendants contend that two important and relevant principles emerge from *GTE Sylvania:* first, that "a party is required to comply with a court order out of respect for the judicial process, even if it has proper grounds to object to the order" and, second, that "an agency's compliance with a court order precludes a determination that the agency acted 'improperly' or wrongfully." (State Defs. Mem. at 11 (Doc. No. 52).) To a lesser extent, the State Defendants also rely on an unpublished decision from the Ninth Circuit, which they say "cogently illustrate[s] the principal espoused in *GTE Sylvania.*" (State Defs. Mem. at 14, citing *Levitoff v. Espy,* 74 F.3d 1246 (9th Cir .1996) (unpublished table opinion).)

In *Levitoff,* a male class of U.S. Forest Service employees brought a Title VII action, seeking monetary and injunctive relief on the basis that a 1981 consent decree entered in a separate lawsuit to remedy discrimination against female employees

("*Bernadi* decree") had the effect of discriminating against males. *See* 74 F.3d 1246, *1. In the district court, seeking to avoid "the impossible position of having to disobey a federal court deliberately," the defendant, who was the Secretary of the Department of Agriculture, argued that, "because the Forest Service was legally obligated and had no choice but to comply with the terms of the Decree," the plaintiffs' claims were subject to dismissal pursuant to the doctrine enunciated by the Supreme Court in *GTE Sylvania, supra. Levitoff v. Espy,* No. 92-4108, 1993 WL 557674, *2-*3 (N.D.Cal. Dec. 14, 1993). Agreeing, the district court dismissed the complaint on the basis of *GTE Sylvania. Id.* at *4. On appeal, the plaintiffs persisted in their argument that *GTE Sylvania* did not pose a bar to their claims, but the Ninth Circuit said they were "dead wrong." [FN4] 74 F.3d 1246, * 1. The Ninth Circuit explained,

> FN4. In the district court, the plaintiffs argued that their collateral attack on the *Bernadi* decree entered in an action to which they were not parties was permissible under *Martin v. Wilks,* 490 U.S. 755 (1989), discussed *infra. See Levitoff,* 1993 WL 557674, *3. By omitting any discussion of *Wilks,* the Ninth Circuit implicitly rejected the plaintiffs' argument.

> The Secretary's compliance with a court order is a complete defense to actions such as these,

> because the *Bernardi* court specifically upheld the validity of the decree and ordered the Secretary to comply with its terms upon penalty of contempt. As the district court correctly held, the Secretary was legally obligated and had no choice but to comply with the terms of the decree. [The plaintiffs'] complaint fails to allege any facts that fall outside the actions mandated by the *Bernardi* consent decree. Thus, the court did not err when it dismissed [the plaintiffs'] claims under the GTE standard. *Id.*

Pope, though, says that *Levitoff* "backhands" *Martin v. Wilks,* 490 U.S. 755 (1989) (hereafter "*Wilks* "), and that *Wilks,* not *GTE Sylvania,* controls because Pope was not a party to the *Frazer* proceedings which culminated in the court's injunctive orders and implementation of the no-bypass rule. (Pl. Resp. at 13 (Doc. No. 56).) In *Wilks,* a group of Caucasian firefighters brought suit to enjoin the enforcement of two consent decrees which implemented a city's affirmative action program and resolved African-American employees' employment discrimination lawsuit against a city fire department. 490 U.S. at 758-59. The Caucasian firefighters alleged that, by adhering to the consent decrees, the city discriminated against them by denying them promotions in favor of less qualified African-American firefighters and that they were entitled to individual relief. *Id.* at 758. The *Wilks* Court rejected the "impermissible collateral attack" rule and allowed the Caucasian firefighters to litigate the merits of their Title VII and equal protection claims attacking the

race-conscious promotion decisions made by the city in reliance on the consent decrees, notwithstanding that the Caucasian firefighters were aware of the prior suit which resulted in the consent decrees, but chose not to intervene. *See id.* at 763; *see id.* at 765 (explaining that "[t]he linchpin of the 'impermissible collateral attack' doctrine-the attribution of preclusive effect to a failure to intervene-is ... quite inconsistent with Rule 19 and Rule 24" of the Federal Rules of Civil Procedure). The Court explained that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." [FN5] *Id.* at 762.

> FN5. Congress overrode *Wilks* in the context of Title VII employment discrimination suits when it enacted the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(n)(1)(A); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (observing that Congress enacted § 108 of the Civil Rights Act of 1991, codified at § 2000e-2(n), in response to the Supreme Court's opinion in *Wilks*, "by prohibiting certain challenges to employment practices implementing consent decrees"). Here, the State Defendants have not relied on that amendment as a ground for summary judgment; thus, as in *Levitoff, supra,* the court need not address "the thorny issue of retroactivity" of 42 U.S.C. § 2000e-2(n)(1)(A). *See* 74 F.3d at 1246, *3 n. 2; *but see Maitland v. Univ. of Minn.*, 43 F.3d 357, 363 (8th

> Cir.1994) (holding that § 108, *supra,* did not apply retroactively to bar a nonparty's challenge to a consent decree entered before § 108's effective date; "[b]y seeking to apply § 108 to bar [plaintiff's Title VII] cause of action, the [employer] is attempting to attach 'new legal consequences' to [plaintiff's] limited participation in the consent decree proceedings, conduct that was completed well before the effective date of the statute").

Pope argues that, under *Wilks,* because he was not joined as a party in the *Frazer* litigation, he is not "bound by the entry of [the] *Frazer* orders" and that, consequently, the State Defendants could not rely on the no-bypass rule so as to deny him a promotion without legal consequences. (Pl. Resp. at 10 (Doc. No. 56)); (*see also id.* at 11, 15.) Pope essentially argues a theory of strict liability, contending that the State Defendants' application of the no-bypass rule to him automatically subjects them to liability under Title VII and § 1983. For the reasons to follow, the court disagrees.

Although the defendants in *Wilks* justified their admittedly race-based employment decisions as mandated by the earlier consent decrees, Pope seizes on the court's reference to a "*judgment* or decree," (Pl. Resp. at 13 (emphasis added)), arguing that, for purposes of *Wilks,* "there is no substantive difference between a consent decree and a court-entered judgment." *Id.* Assuming without

deciding that *Wilks*' rationale applies equally to litigated judgments, the court nonetheless is unpersuaded that *Wilks* mandates the conclusion urged by Pope. In this regard, the court finds instructive the Eighth Circuit's decision in *Donaghy v.. Omaha,* 933 F.2d 1448 (8th Cir.1991), which is not cited by the parties, but is a case in which the plaintiff made an argument similar to the one which Pope proffers:

> [The plaintiff] ... apparently would have us read *Wilks* as nullifying all consent decrees with respect to nonparties. Under [the plaintiff's] reasoning, if an employer is operating under a constitutionally valid consent decree that requires the employer to make race-conscious employment decisions, the employer still could not make race-conscious employment decisions that would in any way affect nonparties to the consent decree.

Id. at 1457. The Eighth Circuit rejected the plaintiff's interpretation of *Wilks,* finding it "flaw[ed]" in that it equates the right to challenge a consent decree with a general right to be free of race-conscious employment decisions taken pursuant to a consent decree. *Wilks* does not create [the plaintiff's] proposed general right. While *Wilks* permits a nonparty to challenge the validity of employment decisions made pursuant to a consent decree, it does not speak to whether a particular race-conscious employment decision taken pursuant to a consent decree will meet constitutional

standards. [The plaintiff] seems to argue that all race-conscious remedies are unconstitutional, notwithstanding the Supreme Court's repeated statements that certain narrowly tailored, remedial, race-conscious employment decisions are permitted under the Constitution. Nothing in *Wilks* disturbs these cases, or other substantive law governing reverse discrimination challenges to consent decrees which require race-conscious affirmative action. *Wilks* simply holds that those who did not participate and were not represented in prior consent decree litigation may have the opportunity to "ask a court to consider their claims that actions taken pursuant to the consent decree are unlawful under the governing statutory and constitutional standards."

Id. at 1457-58 (internal footnotes omitted).

Here, like the plaintiff in *Donaghy,* Pope contends that, not only is he not bound by the no-bypass rule, but also that the rule has no bearing on his claims in this lawsuit. The no-bypass rule, according to Pope, must be ignored in these proceedings. The court, though, finds that Pope's position does not align with the holding in *Wilks* for the reasons articulated in *Donaghy*. If *Wilks* applies to the type of judgment at issue in this case, which as stated above the court may assume without deciding, *Wilks* at best permits Pope to challenge the *Frazer* no-bypass rule uninhibited by the impermissible collateral attack doctrine. That does not mean,

though, that the no-bypass rule is a nullity in either the Title VII or constitutional analysis, as Pope suggests. Nothing in *Wilks* alters the well-settled principles of equal protection and Title VII jurisprudence.

The Eleventh Circuit's decision which *Wilks* affirmed also provides support for the court's finding. *See In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1500-01 (11th Cir.1987). There, after holding that the Caucasian firefighters were not bound by the consent decrees and, thus, entitled to consideration on the merits of those claims in the district court, the Eleventh Circuit stated:

> Because the defendants concede that the challenged promotions were made in a race conscious manner, and because the defendants seek to use the consent decrees to justify their actions, we feel compelled to provide the district court with some guidance as to the legal significance of a consent decree in Title VII litigation when, as in this case, an employer seeks to interpose it as a defense against employees who were neither parties nor privies to it.

Id. at 1500. The Eleventh Circuit explained that, in the Title VII context, the defendants' reliance on the consent decrees was to be analyzed under the standards set out in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). *See id.* at 1500-01.

The foregoing discussion brings this case full circle back to the State Defendants' attack on the merits of Pope's claims. Again, the State Defendants contend that they cannot be held liable under § 1983 or Title VII because in 2002 they were required by a post-trial court injunction to apply the no-bypass rule and it is the application of the no-bypass rule which caused Pope to lose the promotion, not discriminatory conduct on their part. For the reasons set out below, the court finds that no matter which statutory highway Pope travels in his endeavor to reach intentional discrimination, be it § 1983 or Title VII, the State Defendants' adherence to the court-ordered no-bypass rule is a roadblock to recovery on the undisputed facts of this case.

A. *Equal Protection (§ 1983)*

In his complaint, Pope brings an equal protection claim challenging the State Defendants' decision taken pursuant to the no-bypass rule to deny him a promotion. (*See* Compl. at 6 (Doc. No. 1) (alleging that the no-bypass rule as applied to Pope was "not narrowly tailored to achieve a compelling government interest").) To survive an equal protection attack, the State Defendants must show that their application of the no-bypass rule was narrowly tailored to serve a compelling interest. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *see also id.* at 494 (concluding that "the standard of review under the Equal Protection

Clause is not dependent on the race of those burdened or benefitted by a particular classification").

The court finds that *Citizens Concerned About Our Children v. School Board of Broward,* although not cited by the parties, is controlling. *See* 193 F.3d 1285 (11th Cir.1999). In that case, the Eleventh Circuit addressed "whether compliance with a consent decree ever qualifie[s] as a compelling interest for Fourteenth Amendment purposes." [FN6] *Id.* at 1292. Stating that this question is a "question of law, capable of resolution on motion for summary judgment," the court answered in the affirmative. *Id.* It explained that a rule which penalized a governmental entity "for failing to *disobey* the court would not comport with the sanctity of an unchallenged court order." *Id.* (emphasis in original). The Eleventh Circuit reasoned that "[t]his sanctity expresses itself in many forms, most strikingly in the collateral order doctrine, which requires a party subject to a court order to comply with it, pending further review, even if the order arguably violates important constitutional rights." *Id.* This is the point argued by the State Defendants, and the point is well taken. Indeed, the Eleventh Circuit cites *GTE Sylvania, supra,* upon which the State Defendants rely, stating that, "[i]n other contexts, the law considers an enjoined party to have lost the discretion to contravene a court order." *Id.* "Avoiding contempt and respecting the court that entered the consent decree suffice to

make obedience a compelling interest." *Id.* Stated differently, "[w]hen the compelling interest is compliance with a court order, that means that the governmental entity must face a likelihood of contempt under the order if it abandons the racial policy." *Id.* at 1293; *see also Lomack v. City of Newark,* 463 F.3d 303, 310 (3d Cir.2006) (recognizing that compliance with a consent decree is a compelling interest "if the decree mandates the race-based policy at issue") (citing *Citizens Concerned About Our Children,* 193 F.3d at 1292-94).

> FN6. For purposes of the compelling interest inquiry, the court cannot envision any reason why compliance with a court injunction should be treated differently than compliance with a consent decree. In fact, for purposes of his reliance on *Wilks, supra,* Pope insists that there is no distinction between the two.

Here, it is undisputed that the court-ordered no-bypass rule mandated the race-based decision at issue. In 2002, the State Defendants were subject to a court-ordered injunction which required them to adhere to and apply the no-bypass rule when required as they undisputedly did in denying Pope the promotion at issue. Because the denial of the promotion about which Pope complains occurred at a time when the *Frazer* no-bypass rule was in full force and effect, its validity unchallenged at that time, had the State Defendants disregarded the

rule and promoted Pope, they undisputedly would have "face[d] a likelihood of contempt" from the *Frazer* court. *Citizens Concerned About Our Children*, 193 F.3d at 1293; *see also Spallone v. U.S.*, 493 U.S. 265, 276 (1990) ("[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt."). Accordingly, the court finds that in this case "[a]voiding contempt" and "respecting the court" that entered the no-bypass rule "suffice to make obedience a compelling interest." [FN7] *Id.*

> FN7. The court notes that "there is a second reason ... to deem compliance to be a compelling interest." *Citizens Concerned About Our Children*, 193 F.3d at 1293. In *Frazer*, the late Honorable Frank M. Johnson, Jr., identified the past discrimination and made a specific finding that the evidence demonstrated that the State of Alabama engaged in racial discrimination against African-Americans in filling non-menial jobs and that remedial action was essential. As a consequence, he implemented the no-bypass rule to remedy "past discriminatory wrongs" against African-Americans which on this record is "a compelling interest by itself." *Id.* No argument has been made that there was not a compelling interest "at the time" the no-bypass rule was entered, which is the relevant time frame for purposes of the compelling interest inquiry. *Id.* "Complying

> with th[e no-bypass rule] in particular thus reflect[s] another compelling interest beyond respect for court orders." *Id.; see also Newark Branch, NAACP v. Harrison,* 940 F.2d 792, 807-08 (3d Cir.1991) ("Where there is an adequate finding of past discrimination and the remedy is formulated to address this past discrimination, affirmative recruitment efforts mandated by the district court do not violate equal protection guarantees").

Turning to the narrowly-tailored component of the equal protection analysis, the court finds that the question is whether the State Defendants' application of the no-bypass rule so as to deny Pope the promotion was narrowly tailored to further compliance with the court-mandated no-bypass rule. The court cannot answer this question in Pope's favor because it is undisputed that compliance with the no-bypass rule required the State Defendants to rescind the promotional offer to Pope and offer the promotion to an African-American employee who ranked higher on a certificate of eligibles.[FN8] (*See, e.g.,* Pl. Resp. at 9, stating that "[i]t is undisputed that the decision to rescind Pope's promotion was based on the race-based *Frazer* rule" (Doc. No. 56).) To comply with the no-bypass rule, the only choice available to the State Defendants was to deny Pope the promotion. As the State Defendants point out, the no-bypass rule left them with no discretion, but had they had discretion, they would have promoted

Pope. There simply was no mechanism by which the State Defendants could promote Pope and at the same time fulfill their duty to obey the court-mandated rule. Had they promoted Pope, the State Defendants would have directly contravened the no-bypass rule. In other words, they did not have available an alternative remedy which would have allowed them to promote Pope without violating the no-bypass rule. *See generally Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 217 (4th Cir.1993) (defining "narrowly tailored"). Under these facts, the court finds that not only was the decision denying Pope a promotion justified by a compelling interest (*i.e.,* the State Defendants' compliance with the court-ordered no-bypass rule), but also that the decision was narrowly tailored to further compliance.

> FN8. The court notes that, in *Citizens Concerned About Our Children,* the Eleventh Circuit did not reach the narrowly tailored prong because the racial busing policy at issue was not explicitly mandated by the consent decree; its implementation had to be "implied." 193 F.3d at 1293. As there was an absence of evidence making it unclear whether the school board would have been subject to contempt for not complying with the busing policy, summary judgment was inappropriate on the compelling-interest inquiry. *See id.* at 1294. Here, to the contrary, it is undisputed that the State

> Defendants could have been sanctioned for contempt for violating the no-bypass rule if they had promoted Pope. (*See, e.g.*, Pls. Resp. at 16 (Doc. No. 56).)

Pope offers three arguments which he says demonstrate a constitutional violation on the part of the State Defendants. For the reasons to follow, the court is not persuaded by these arguments.

First, Pope's argument, as discussed above, that he is not bound by the no-bypass rule does not negate the State Defendants' compelling interest in complying with the rule. (Pl. Resp. at 10-11, 15 (Doc. No. 56).) This principle was made clear in *Citizens Concerned About Our Children*, where the Eleventh Circuit noted:

> The plaintiffs contend that, even if compliance with the decree were a compelling interest in some cases, it should not justify discrimination against them because they were not parties to the litigation that generated the decree. We can't see the logic here; whether or not these plaintiffs are bound by the decree, the School Board obviously is, and the question is whether the School Board has a compelling interest.

193 F.3d at 1292 n. 7.

Second, Pope points to Judge Thompson's Order terminating the no-bypass rule in June 2006,

suggesting that the no-bypass rule could not have withstood a constitutional attack in 2002 when it was applied to him. Judge Thompson's Order, though, did not affect the obligation of the State Defendants four years earlier in 2002 to comply with the no-bypass rule. In 2002, there had not been a judicial determination of unconstitutionality which is what counts. To reiterate, an enjoined party must obey an unconstitutional order until it is adjudged unconstitutional.[FN9] *GTE Sylvania,* 445 U .S. at 386 ("persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, *even if they have proper grounds to object to the order* ") (emphasis added); *Belk v. Charlotte-Mecklenburg Bd. of Educ.,* 269 F.3d 305, 399 (4th Cir.2001) (explaining that under *GTE Sylvania* "to hold that an entity acts 'improperly' in obeying a valid court order 'would do violence to the common understanding of the term improperly,' even if the order is later held unlawful or unconstitutional") Similarly, even assuming that the State Defendants believed that they had "proper grounds to object" to the no-bypass rule, *GTE Sylvania,* 445 U.S. at 386, a reasonable assumption given that they vigorously opposed the employment discrimination lawsuit that led to the issuance of the no-bypass rule, the State Defendants nonetheless were required to obey it until its modification or reversal. *Id.* In short, the court finds that Pope's argument fails to overcome the barricade of *GTE Sylvania.*

> FN9. The court notes that the *GTE Sylvania* Court pointed out that its rule is subject to exceptions when the issuing court lacked personal or subject matter jurisdiction or when the injunction, when entered, had only a "frivolous pretense to validity." 445 U.S. at 386. No argument has been made that these exceptions are applicable in this lawsuit and appropriately so.

Third, in light of the questionable constitutionality of the no-bypass rule in 2002, Pope blames the State Defendants for "blindly adhering" to the rule, asserting that the State Defendants could have either promoted him or "gone immediately before the district court [in *Frazer*] and sought relief from the [no-bypass] rule, citing Pope's constitutional argument, thus attempting to protect his rights." (Pl. Resp. at 15-16 (Doc. No. 56).) According to Pope, the State Defendants now must "face the consequences of [their] failure to seek timely relief from an order [they] knew full well unlawfully impaired Pope's rights." (*Id.*) The first option is not an option. The State Defendants could not lawfully challenge the order by violating it. *See GTE Sylvania,* 445 U.S. at 386. As to the second option, while the State Defendants filed a motion to terminate the no-bypass rule in May 2003 (*see Frazer,* 2:68cv2709, Op. at 2 (Doc. No. 779)), Pope would have this court find that their challenge which ultimately was successful comes too late for purposes of avoiding liability in this lawsuit. Pope

essentially seeks to hold the State Defendants liable for not acting sooner. Notably, though, the court cannot find, and Pope has not directed the court's attention to, any authority or evidence which supports a conclusion or an inference that the State Defendants engaged in intentional discrimination when they did not seek judicial relief from the court-ordered no-bypass rule immediately when Pope became eligible for the promotion at issue. *See generally Washington v. Davis,* 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."). The court rejects Pope's argument because to accept it is to engage in impermissible speculation. Moreover, it is noteworthy, as the State Defendants point out, that if they had not been constrained by the no-bypass rule, they would have promoted Pope. For the foregoing reasons, the court finds that summary judgment is due to be entered in favor of the State Defendants on Pope's equal protection claim.

B. *Title VII*

The court turns to Pope's Title VII failure-to-promote claim, alleging disparate treatment. Relying on *Levitoff, supra,* in which the Ninth Circuit held that the defendant's "compliance with a court order" was a "complete defense" to Title VII liability pursuant to *GTE Sylvania, supra, see* 74 F.3d 1246, the State Defendants argue that this

court can summarily reach the same outcome by applying the *GTE Sylvania* holding to the facts of this case. The State Defendants may be correct that, on the facts of this case, *GTE Sylvania* precludes further analysis, but the court need not decide because it would reach the same result even if it applied the familiar burden-shifting framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), as modified in *Johnson v. Transportation Agency,* 480 U.S. 616, 626-27 (1987).[FN10] *See Johnson,* 480 U.S. at 626 (holding that Caucasian employee's Title VII claim that his employer discriminated against him through application of an unconstitutional affirmative action plan "fits readily within the analytical framework" of *McDonnell Douglas, supra*); *see In re Birmingham,* 833 F.2d at 1499 (directing district court to evaluate employer's defense that adverse action was required by consent decree based upon the principles announced in *Johnson, supra*).

> FN10. For a comparison between the strict scrutiny test, applied above, and *Johnson's* Title VII test, *see Krupa v. New Castle County,* 732 F.Supp. 497, 507-08 & n. 35 (D.Del.1990).

Briefly, to explain, there is no dispute that race was "taken into account" in the decision to deny Pope the promotion, which is all the proof needed for Pope to establish a prima facie case. *Johnson,* 480 U.S. at 626. Instead, moving for summary judgment, the State Defendants focus on their

intermediary burden by relying on the no-bypass rule as providing the nondiscriminatory reason for their decision to deny Pope the promotion at issue. The court agrees with the State Defendants that compliance with a court order is a legitimate and nondiscriminatory reason for taking an adverse employment action. *Cf. id.* (reliance on affirmative action plan provides nondiscriminatory rationale for employer's decision to deny employee a job benefit); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1018 (11th Cir.1982) (articulating as nondiscriminatory reason for the adverse employment action that the promotion procedure was dictated by the union contract). Indeed, the fact that the State Defendants denied him the promotion solely to comply with the *Frazer* no-bypass rule is not in contention. (*See, e.g.*, Pl. Resp. at 9, stating that "[i]t is undisputed that the decision to rescind Pope's promotion was based on the race-based *Frazer* rule and Pope's race" (Doc. No. 56).) Because the no-bypass rule is the basis for the State Defendants' decision, "the burden shifts to [Pope] to prove that the employer's justification is pretextual and the [rule] is invalid." *Johnson*, 480 U.S. at 626.

Johnson was a discrimination suit brought by a Caucasian male who alleged that the promotion of an allegedly less qualified female pursuant to a voluntary affirmative action plan violated his rights under Title VII. The *Johnson* court set forth a two-part test for evaluating whether an affirmative

action plan is valid. First, the court must decide whether consideration of race "was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of [minorities] in 'traditionally segregated job categories.' " *Id.* at 631 (quoting *United Steelworkers v. Weber,* 443 U.S. 193, 197 (1979)); *see id.* at 632 n. 10 (explaining that the proof needed to show a manifest imbalance may be shown without the more rigorous proof necessary to establish a prima facie case of discrimination against the employer). Second, the affirmative action plan must not "unnecessarily trammel [ ] the rights of [nonminority] employees or create[ ] an absolute bar to their advancement." *Id.* at 637-38.

There, though, is a notable distinction between this case and *Johnson.* Unlike in *Johnson,* the court is not confronted with an affirmative action plan voluntarily implemented by the employer. The state did not choose to resolve this case through a negotiated agreement; it vigorously contested liability, surrendering only when the *Frazer* court found against it. *See Frazer,* 2:68cv2709, Op. at 3 (Doc. No. 779) (observing that the *Frazer* court implemented the no-bypass rule after a trial on the merits based upon a judicial determination that " 'up until 1970, the State of Alabama unabashedly refus[ed] to hire and promote African-Americans to almost any and all non-menial positions in state government because of their race' ") (citation omitted). The fact that the relief in this case, more specifically the no-bypass rule, was created and

mandated by an Article III judge after a trial on the merits distinguishes this case factually from *Johnson*.

The issue is what legal effect, if any, does a judicial determination of liability have on the *Johnson* inquiries. *See, e.g., In re Birmingham,* 833 F.3d at 1501 n. 22 (suggesting a distinction between a judicial determination and an affirmative action plan when it "emphasized that there has been no judicial determination that the City is liable for past discrimination"). In *Cohen v. Brown University,* the First Circuit observed that, for purposes of an equal protection challenge, a federal district court's remedy "does not raise the concerns underlying the Supreme Court's requirement of a particularized factual predicate to justify voluntary affirmative action plans." 101 F.3d 155, 171 (1st Cir.1996). It continued,

> Here, gender-conscious relief was ordered by an Article III court, constitutionally compelled to have before it litigants with standing to raise the cause of action alleged; for the purpose of providing relief upon a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based upon findings of fact that were subject to the Federal Rules of Evidence. The factual problem presented in affirmative action cases is, "Does the evidence support a finding of

> discrimination such that race- or gender-conscious remedial measures are appropriate?" We find these multiple indicia of reliability and specificity to be sufficient to answer that question in the affirmative.

Id. at 172-73.

Here, as in *Cohen,* there was a judicial finding of intentional discrimination after a trial on the merits. The *Frazer* court set out its findings after a detailed evidentiary discussion of the underrepresentation of African-Americans in non-menial state jobs and the discriminatory practices which led to the disparity.[FN11] *See Frazer,* 317 F.Supp. at 1085-90. The court concluded that the ADOC, among other state defendants, had "engaged in a pattern and practice of racial discrimination in employment" and that "progress toward erasing the effects of prior exclusionary practices upon the basis of race ha [d] been minimal and in many instances non-existent." *Frazer,* 1976 WL 729, *6. Applying *Cohen's* rationale, the court finds that the prior determination of past discrimination by the *Frazer* court satisfies the *Johnson* inquiry that the remedial action be supported by a manifest imbalance. Stated differently, on the facts of this case, the court finds that the *Frazer* court's judicial determination of liability dispenses with the need for further evidentiary analysis as to the first *Johnson* inquiry.

FN11. To elaborate, in *Frazer,* the court ruled

> that the ADOC and other state agencies discriminated against African-Americans in their hiring and promotional decisions regarding non-menial employment positions. The *Frazer* court recognized that the prevalent racial discrimination within the various state agencies with regard to employment practices required the issuance of injunctive orders to remedy the discrimination, including implementation of the no-bypass rule. *See, e.g., Frazer,* 317 F.Supp. at 1090 (finding "it necessary to enter a detailed and specific decree which will not only prohibit discrimination but which will also prescribe procedures designed to prevent discrimination in the future and to correct the effects of past discrimination"). The purpose of the no-bypass rule, thus, was "designed to break down old patterns of racial segregation and hierarchy" and was "structured to 'open employment opportunities for [African-Americans] in occupations which ha[d] been traditionally closed to them.' " *Weber,* 443 U.S. at 208.

The foregoing finding leads to consideration of whether the no-bypass rule "unnecessarily trammeled the rights of [nonminority] employees or created an absolute bar to their advancement." *Johnson,* 480 U.S. at 637-38. The short answer is "No." The no-bypass rule did not require the discharge or demotion of Caucasian workers and

their replacement with African-American employees. Qualifications and fitness for the job were considerations in the selection process. *See Frazer,* 317 F.Supp. at 1091 (application of the no-bypass rule was not required if "the defendants determine[d] that the [African-American] applicant [was] not qualified to perform the duties of the position, or [was] otherwise not fit for the position."). Moreover, the court did not impose mandatory hiring quotas. *See Frazer,* 1976 W.L. 729, *6. Nor did the no-bypass rule create an absolute bar to the advancement of Caucasian employees; for example, there was no requirement that the state bypass higher-ranked Caucasian applicants in favor of lower-ranked African-American applicants on a certificate of eligibles. *See Frazer,* 317 F.Supp. at 1091.

Based on the foregoing, the court finds that, to the extent that the *Johnson* inquires are relevant in this case, they are satisfied. Furthermore, the court finds that Pope's arguments which the court rejected in the preceding subsection likewise are insufficient to establish an issue of material fact on pretext. Accordingly, the court finds that the State Defendants are entitled to summary judgment on Pope's Title VII claim.

VI. ORDER

Accordingly, it is CONSIDERED and ORDERED that the State Defendants' motion for summary

judgment (Doc. No. 51) be and the same is hereby GRANTED.

A judgment in accordance with this Memorandum Opinion and Order shall be entered separately.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-14729

D.C. Docket No. 03-00199-CV-2-D-N

TIMOTHY D. POPE,

Plaintiff-Appellant,

versus

STATE OF ALABAMA,
ALABAMA DEPARTMENT OF CORRECTIONS,
ALABAMA STATE PERSONNEL DEPARTMENT,
JACKIE B. GRAHAM,
in her official capacity as the Director
of the Alabama State Personnel Department and
successor to Thomas G. Flowers,
RICHARD F. ALLEN,
in his official capacity as the Commissioner
of the Alabama Department of Corrections and
successor to Michael Haley and Donal Campell,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Alabama

(July 17, 2009)

Before DUBINA, Chief Judge, EDMONDSON and HILL, Circuit Judges.

PER CURIAM:

This is an appeal from the grant of a motion for summary judgment in favor of the State of Alabama, the Alabama Department of Corrections (ADOC), the Alabama State Personnel Department (ASPD), ASPD's director, and ADOC's commissioner (collectively, the State), on claims brought by Timothy Pope (Pope) pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (Title VII), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983 (Section 1983). Based upon the following, we affirm the judgment of the district court.[1]

I.

In August 2002, Pope, an ADOC white male employee working at the Bibb Correctional Facility in Brent, Alabama, as Correctional Officer I, was notified that his name had been placed on a certificate of eligible candidates for promotion to

[1] The procedural and factual history of this case is thoroughly set forth in the twenty-nine (29) page memorandum opinion and order of the district court dated July 24, 2008; therefore we cite background only relevant to this appeal.

Correctional Officer II. In September 2002, he interviewed for the position, was offered and accepted the position.

However, final authority for the decision to promote rested up the administrative pipeline with the ASPD. In its due diligence, the ASPD determined that a higher ranking African-American female's name was also listed on the certificate of eligibility. Pope's ADOC offer to promote was rescinded by the ASPD as forbidden by the "no-bypass" rule mandated in 1970 by court order, *United States v. Frazer*, 317 F. Supp. 1079, 1091 (M.D. Ala. 1970), then in full force and effect.[2]

Pope filed suit against the State under Title VII and Section 1983 in 2003. This appeal results.[3]

II.

The *Frazer* no-bypass rule prohibited the State from overlooking a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles, unless

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[2] The record is patently clear that, in 1970, the State was engaged in a widespread, systematically biased pattern and practice of discriminating against African-Americans in its hiring and promotional practices. *Frazer* was a comprehensive remedial order, entered for the purpose of correcting these practices. The judicially imposed no-bypass rule was but one of its many provisions.

[3] The record indicates that Pope was promoted in 2004.

the African American was unqualified or unfit for the position. *See Frazer*, 317 F. Supp. at 1091. This long-standing litigation and the rules resulting therefrom remained in effect for thirty-five years, from 1970, until temporarily suspended in May 2005, *United States v. Flowers*, 372 F. Supp.2d 1319 (M.D. Ala. 2005), and finally terminated in June 2006. *United States v. Flowers*, 444 F. Supp.2d 1192 (M.D. Ala. 2006).

III.

Citing *Martin v. Wilks*, 109 S.Ct. 2180 (1989), Pope argues that he is not bound by the court decree of Frazer because he was not named as an original party to the litigation.[4] Pope also contends that his promotion was clearly rescinded because of his race and that the State falsely claims immunity under an ancient rule to which he was not joined as a party. It is thereby unconstitutionally trying to shield itself from any claims by Pope for race discrimination.

Pope claims that *Frazer's* no-bypass rule is unconstitutional on its face, and, that the State, in

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[4] Pope argues throughout that the Supreme Court, in *Martin v. Wilks*, 109 S.Ct.2180 (1989), stands for the proposition that, a non-party to an adjudicated judgment or a consent decree, has the right to attack a race-based program as unconstitutional. *See also United States v. Jefferson County*, 720 F.2d 1511, 1518 n.16 (11th Cir. 1983) (where there is no distinction between a consent decree and a litigated judgment for purposes of *res judicata* and collateral estoppel).

2002, should have either sought relief or a waiver on his behalf from the 1970 order.[5] Pope contends that the record shows that in the Spring of 2002, the State admits that the no-bypass rule was unconstitutional on its face, and could no longer pass muster under a strict scrutiny analysis. *See City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 106 S.Ct. 1842 (1986). Pope further contends that when a non-African-American is not joined as a party in a race discrimination case, he is not bound by its judgment. *See Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

IV.

The State cites *Martinez v. City of St. Louis*, 539 F.3d 857 (8th Cir. 2008), for the proposition that compliance with a consent decree in order to avoid contempt is a complete defense to an equal protection claim. It also cites *Citizens Concerned About Our Children v. School Bd. of Broward County, Fla.*, 193 F.3d 1285 (11th Cir. 1999), another equal protection case where compliance is a complete defense, as a violation would be punishable by contempt. *Id.* at 1292 ("A potential for contempt alone could provide the [defendant] a compelling interest to observe racial policies... [a]ny

[5] The record indicated that Pope was ultimately successful in challenging the validity of the no-bypass rule in 2005, three years after his promotion was rescinded in 2002, and one year after he was actually promoted in 2004.

rule that punished the [defendant] for failing to *disobey* the court would not comport with the sanctity of an unchallenged court order") (alteration in original) (citations omitted).

> "Avoiding contempt and respecting the court that entered the [court order or] the consent decree suffice to make obedience a compelling interest." *Citizens Concerned*, 193 F.3d at 1292. "A contravening compelling interest justifies an explicitly racial policy only when the policy is narrowly tailored to serve that interest." *Id.* at 1293.[6]

V.

At the time Pope's promotional offer was rescinded in 2002, the State was clearly bound by Frazer's court order, valid and in effect since 1970. Had, in 2002, the State violated the no-bypass rule, before the rule was temporarily suspended in 2005, or permanently terminated in 2006, it would have been subject to contempt.[7]

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[6] The State contends that Pope can not rely upon *Wilks* as it stands merely for the proposition that a non-party to an adjudicated court order or a consent decree has the procedural right to challenge it, but that non-party must still prove the substantive merits of his or her Title VII and Section 1983 claims. We agree.

[7] In May 2002, in order to determine whether the no-bypass rule was still necessary, the State hired statistical experts to examine the racial composition of the Alabama workforce as well as the

(continued...)

We conclude that, as the no-bypass rule was in effect in 2002, the State was required, and fully justified, in abiding by its enforcement. Indeed it was in the compelling interest of the State to avoid a violation punishable by contempt and to respect the sanctity of the *Frazer* court. Indeed, the State was required to obey the order until it was either reversed or modified. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 100 S.Ct. 1194 (1980).

VI.

We have thoroughly considered the record in this appeal, the briefs, and the arguments of counsel put forth at oral argument. We find no merit to Pope's Title VII or Section 1983 claims. Although the no-bypass rule was eventually found to be unconstitutional and terminated, as, in essence, the rule had "done its job," Pope cannot retroactively bootstrap this 2006 finding back to the past, and hold the State liable for actions it made in 2002, in rescinding his promotion. The State cannot be punished for *failing to disobey* a valid court order. *See Citizens Concerned*, 193 F.3d at 1292.

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[7](...continued)
racial patterns of recent selections in the workforce. The purpose was to allow the State to garner hard evidence with which to support a motion to terminate the rule. The State suspected, yet had no actual evidence in 2002, that sufficient numbers of African-American persons had been promoted to high-level positions throughout Alabama and that the rule no longer fit the circumstances existing in the State.

We affirm the judgment of the district court granting summary judgment in favor of the State.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-14729

TIMOTHY D. POPE, [Filed: Sep 11 2009]

Plaintiff-Appellant,

versus

STATE OF ALABAMA,
ALABAMA DEPARTMENT OF CORRECTIONS,
ALABAMA STATE PERSONNEL DEPARTMENT,
JACKIE B. GRAHAM,
in her official capacity as the Director
of the Alabama State Personnel Department and
successor to Thomas G. Flowers,
RICHARD F. ALLEN,
in his official capacity as the Commissioner
of the Alabama Department of Corrections and
successor to Michael Haley and Donal Campell,

Defendants-Appellees.

On Appeal from the United States District Court
For the Middle District of Alabama

ON PETITIONS FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before DUBINA, Chief Judge, EDMONDSON and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ [James C. Hill]
UNITED STATES CIRCUIT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TIMOTHY D. POPE,	
Plaintiff,	
v.	Civil Action No. 03-W-199-N
STATE OF ALABAMA, ALABAMA DEPARTMENT OF CORRECTIONS, the ALABAMA STATE PERONNEL DEPARTMENT, TOMMY G. FLOWERS, in his official capacity as Director of the Alabama State Personnel Department, and MICHAEL W. HALEY and DONAL CAMPBELL, in their official capacity as Commissioners of the Alabama Department of Corrections,	**DEMAND FOR JURY TRIAL** **CLAIM OF UNCONSTITUTIONALITY**
Defendants.	

COMPLAINT

I. Jurisdiction

1. This is a civil action arising under Title VII of the Civil Rights Act of 1964, as amended ("Civil Rights Act"), 42 U.S.C. §§ 2000e, et seq., the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § § 1331, 1243, 1367, 2201 and 42 U.S.C. § 2000e, et seq., to secure protection of and redress for the deprivation of rights to obtain relief for racial discrimination.

II. Venue

2. Venue for this action is proper in the United States District Court for the Middle District of Alabama under 28 U.S.C. § 1391(b). A substantial portion of the unlawful events giving rise to these claims occurred within this district, and all defendants reside or can be found in this district.

III. Parties

3. Plaintiff Timothy D. Pope is over 19 years of age and resides in Jefferson County, Alabama. Plaintiff is a white male employee of the Alabama Department of Corrections.

4. Defendant Alabama Department of

Corrections ("ALDOC") is an agency of the defendant State of Alabama. ALDOC is an employee as defined by the Civil Rights Act and has the ultimate authority over the employment, termination, and working conditions of its employees, including the plaintiff. For all times relevant to this complaint and at present, ALDOC has been and is the plaintiff's employer.

5. Defendant Michael W. Haley was the Commissioner of the Alabama Department of Corrections during the time of this unlawful conduct and the public official responsible for the acts described in paragraphs 9-17 below. Haley is sued in his official capacity only.

6. Defendant Donal Campbell is the Commissioner of the Alabama Department of Corrections at the time of the filing of this complaint and the public official responsible for the administration of lawful employment policies and procedures for all of the State of Alabama's corrections personnel. Campbell is sued in his official capacity only.

7. Defendant Alabama State Personnel Department ("SPD") is an agency of the defendant State of Alabama. SPD is an employer defined under the Civil Rights Act and has ultimate authority over the examinations, employment registers, and certification of candidates for all jobs under the State merit system, including the

interpretation and application of all laws, statutes and rules governing such activities. At all times relevant to this complaint SPD has maintained authority over these activities.

8. Defendant Tommy G. Flowers is the Director of the Alabama State Personnel Department during the time of this unlawful conduct and the public official responsible for the acts described in paragraphs 6-14, below which are attributed to SPD. Flowers is sued in his official capacity only.

IV. Facts

9. Plaintiff is a white male employed as a Correctional Officer I for the Alabama Department of Corrections at its Draper Correctional Facility located in Montgomery County, Alabama.

10. On or about August 20, 2002, the plaintiff was notified by ALDOC that his name had been received on a certificate of eligible candidates as promulgated by the State of Alabama Personnel Department for promotion to the classification of Correctional Officer II. The position that ALDOT intended to fill was located at the Bibb Correctional Facility, located in Bibb County, Alabama. The plaintiff was instructed to contact the warden at the Bibb facility if he wished to be considered for the position. *See* Letter, dated August 20, 2002, attached as Exhibit A.

11. On or about September 3, 2002, the plaintiff participated in a panel interview for the position, conducted by Warden Cheryl Price, a black female, and two Captains employed by ALDOC at the Bibb facility, one a white male, the other a black male.

12. On or about September 19, 2002, the plaintiff was contacted via telephone by Warden Price, who offered the Correctional Officer II position to the plaintiff. The plaintiff immediately accepted the appointment. The plaintiff was further informed in this same telephone call that he would begin his new assignment on October 5, 2002, and received congratulations from Warden Price on the appointment. *See* E-mail from Jacqueline Owens (assistant to the Warden), dated September 19, 2002, attached as Exhibit B.

13. Because the position was located approximately eight (80) miles from the plaintiff's residence in Montgomery, he immediately began making arrangements to relocate to the greater Birmingham area. On or about September 19, 2002, the plaintiff informed his landlord of his necessity to break the terms of his lease and acknowledged that he would incur financial penalties for doing so. Nevertheless, the plaintiff paid the costs and began the process of relocation to a residence nearer his new work assignment. The plaintiff then executed a lease on a dwelling in the Birmingham area, and expedited plans to be married to his fiancé who was residing and

employed in Birmingham.

14. On or about September 25, 2002, and after the plaintiff had completed his relocation to the greater Birmingham area, Warden Price contacted the plaintiff by telephone and rescinded the plaintiff's promotion to Correctional Officer II. Warden Price explained that she was under orders from the State Personnel Department that she could not promote a white male over a black female. The defendants discriminated against the plaintiff because of his race by denying the plaintiff promotion to Correctional Officer II and appointing an African-American to the position of Correctional Officer II. Race was the sole factor in the selection of the candidate that received the appointment and the decision not to appoint the plaintiff.

15. On or about September 27, 2002, the plaintiff met with ALDOC Personnel Director Dora Jackson, a black female, for clarification of ALDOC's actions and to attempt to resolve the matter informally. Ms. Jackson confirmed that the plaintiff was selected by the interview panel as the most appropriate candidate for the position, but offered as the sole reason for the denial of the appointment was that the plaintiff could not receive the appointment over a black female candidate. The plaintiff then engaged in further discussions with Ms. Jackson and other ALDOC officials to resolve the issue by, *inter alia*, allowing him a lateral transfer (as a Correctional Officer I) to another

ALDOC facility in the greater Birmingham area to alleviate the hardship and expense that he would endure in commuting to and from the Draper facility in Montgomery, to his newly established residency in Birmingham. The plaintiff's request for accommodation was denied, and at the time of the filing of this complaint continues to commute 160 miles per day (round trip) from his residence to the Draper Correctional Facility.

16. The plaintiff sought further clarification of ALDOC's actions by contacting ALDOC's office of counsel. On December 4, 2002, ALDOC General Counsel Andrew W. Redd responded by letter to the plaintiff, stating "[W]arden Price selected you for the promotion and verbally advised you of her decision. The necessary paperwork for this promotion was submitted through Department of Corrections Personnel to State Personnel for approval and processing. State Personnel rejected this promotion because it was not in compliance with the provisions of *U.S. v. Frazer*, 317 F.Supp. 1079 which does not permit the promotion of a lower ranking certified white candidate over a higher ranking black candidate unless all higher ranking black candidates either decline or are ineligible to accept the promotion. A black candidate, who neither declined nor was ineligible was in Band 3. Thus you were precluded from selection, by State Personnel, and a black male in the same band as you were selected for the promotion." The defendants have admitted that

plaintiff's appointment was rescinded solely due to his race. *See* Letter, dated December 4, 2002, attached as Exhibit C.

17. On or about October 22, 2002, the plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of race and gender. *See* Charge of Discrimination, dated October 22, 2002, attached as Exhibit D. On or about December 4, 2002, the plaintiff received a Right-to-Sue letter under Title VII. *See* Dismissal and Notice of Rights, dated December 4, 2002, attached as Exhibit E.

Claim of Unconstitutionality

18. The plaintiff re-alleges and incorporates paragraphs 9-17 above as if fully set out herein and further avers that the continuing application of the "Frazer No By-Pass" rule as set forth and ordered by this court in *U.S. v. Frazer*, 317 F.Supp. 1079, is an unconstitutional race-conscious practice. The *Frazer* rule, both facially and as applied in this case does not comply with constitutional standards as set forth by the United States Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 103 L. Ed. 2d 854, 109 S.Ct. 706 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 132 L. Ed 2d 158, 115 S.Ct. 2097 (1995); *et al.* The provisions of the "*Frazer* No By-Pass" rule are not narrowly tailored to achieve a compelling governmental

interests. Despite the fact that the defendants have been aware of the changes in governing caselaw for many years, they continue to adhere to a practice which they know, or should have known, violates the constitutional rights of non-black employees and job applicants like the plaintiff. The plaintiff will file a complaint and motion in intervention in *United States v. Frazer* subsequent to the filing of this complaint.

V. Causes of Action

Count I

19. The plaintiff re-alleges and incorporates paragraphs 9-17 above as if fully set out herein and further states that the defendants have unlawfully discriminated against the plaintiff on the basis of his race in violation of Title VII of the Civil Rights Act of 1964.

Count II

20. The plaintiff re-alleges and incorporates paragraphs 9-17 above as if fully set out herein and further states that the defendants have unlawfully discriminated against the plaintiff on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, enforceable by 42 U.S.C. § 1983.

VI. Prayer for Relief

Wherefore, plaintiff Timothy D. Pope asks this Court to grant him the following relief:

a. grant the plaintiff a declaratory judgment that the practices complained of herein are in violation of the provisions of Title VII of the Civil Rights Act of 1964, as amended, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983;

b. grant the plaintiff an Order enjoining defendants and all persons acting in concert with defendants from engaging in discriminatory employment practices on the basis of race;

c. grant the plaintiff an Order requiring the defendants to make the plaintiff whole by awarding the plaintiff backpay (with interest), instatement into the position the plaintiff would have held if the defendants had not discriminated against the plaintiff because of race, and compensation for loss of pension and other benefits;

d. grant the plaintiff an award of compensatory damages, including but not limited to an award for mental anguish and emotional distress;

e. grant the plaintiff an award of all costs

and expenses including an award of reasonable attorney's fees; and

f. award such other relief as may be appropriate.

Dated: February 20, 2003

JURY DEMAND

Plaintiff demands a trial by struck jury on all issues so triable.

/s/
Raymond P. Fitzpatrick, Jr. (FIT001)

/s/
R. Scott Clark (CLA061)

/s/
Gary L. Brown (BRO186)

Attorneys for Plaintiff

Of Counsel
FITZPATRICK, COOPER & CLARK, LLP
Farley Building, Suite 600
1929 Third Avenue North
Birmingham, Alabama 35203
Phone: (205) 320-2255
Fax: (205) 320-7444

From: Owens, Jacqueline
Sent: Thursday, September 19, 2002 12:35 PM
To: DOC -> All Staff & Facilities
Subject: Promotion

Please join us in congratulating Office Timothy Pope, Draper Correctional Facility on his promotion to Correctional Officer II (Sergeant) effective October 5, 2002. I would like to thank the many outstanding individuals who interviewed.

Jacqueline Owens
Bibb Co. Correctional Facility

EXHIBIT B

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA

TIMOTHY D. POPE	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL
	)	ACTION
STATE OF ALABAMA	)	NO. 03-W-
DEPARTMENT OF	)	199-N
CORRECTIONS, *et al.*	)	
	)	
Defendants,	)	
	)	

ANSWER

Come now the Department of Corrections and Defendant Donal Campbell, by and through undersigned counsel, and file this Answer to plaintiff's Complaint heretofore filed stating as follows:

1. Defendants do not contest the jurisdictional averments as set forth in the Complaint.

2. Defendants do not object to this venue.

3. Defendants admit that plaintiff is over the

age of 19 years, that he is a white male and that he is employed by the Alabama Department of Corrections. Strict proofs of plaintiff's residence are demanded.

4. Defendants admit, in part, the averment contained herein; however, the employment of, termination of and working conditions of its employees, including the plaintiff, are subject to te provisions of State statutes and State Merit System regulations, policies and procedures as administered and enforced through the State Personnel Department and Board. Strict proofs to the contrary are demanded.

5. Admitted that Michael Haley served as Commissioner of the Department of Corrections from January 18, 1999 until he was replaced by Donal Campbell on January 29, 2003. Michael Haley is not currently employed with the Department of Corrections in any capacity. Undersigned counsel is not authorized to accept service of process on his behalf or to respond to material averments on Haley's behalf. However, inasmuch as Michael Haley is sued in his official capacity only, he cannot be held individually liable under 42 U.S.C. Section 1983, and since he is no longer affiliated with the Alabama Department of Corrections in any capacity, he is not a necessary party for the implementation of any equitable relief under either Section 1983 or Title VII, should such be ordered.

6. Admitted that Donal Campbell currently serves as Commissioner for the Alabama Department of Corrections having been so appointed on January 29, 2003. His duties and responsibilities are set forth in Title 14-1-1 et. Seq. Code of Alabama 1975. His authority, with respect to employment of, termination of, promotion of, and the working conditions of merit employees within the Department are subject to State statutes and State Merit System regulations, policies and procedures as administered and enforced through the State Personnel Department and Board. Strict proofs to the contrary are demanded.

7. Neither admitted or denied. Strict proofs are demanded.

8. Admitted that Timothy G. Flowers is the Director of the Alabama State Personnel Department.

9. Admitted

10. Admitted

11. Admitted

12. Admitted that on or about September 19, 2002 the plaintiff was contacted via telephone by Warden Price and asked if he would accept the promotion at Bibb County Correctional Facility. Admitted that the plaintiff advised Warden Price

that he would accept the position.

Warden Price informed the plaintiff that the tentative start date for the job at Bibb County Correctional Facility was the October 5, 2002 pay period if cleared by the Departmental Personnel division.

13. Defendants can neither admit nor deny the averments having insufficient information to do so; strict proofs are demanded.

14. Admitted that, on or about September 25, 2002, Warden Price contacted the plaintiff via telephone and advised him that his promotion had been rescinded. All other averments contained herein denied, and strict proofs are demanded thereof.

15. Admitted that, on or about September 27, 2002, plaintiff met with Department of Corrections Personnel Director Dora Jackson and advised that his promotion had been rescinded at the direction of the State Personnel Department. All other averments are denied and strict proofs are demanded thereof.

16. Admitted that the letter attached as Exhibit C was sent to the plaintiff.

17. Admitted

18. Defendants neither admit nor deny the

averments contained herein. The Department of Corrections and its Commissioner Donal Campbell are, with respect to hiring of, promotion of, termination of and working conditions of its merit employees, required to adhere to State Merit System statutes, rules, policies and procedures as administered and enforced through the State Personnel Department and Board. Neither the Department of Corrections nor its Commissioner is authorized to disregard these statutes, rules, policies, and/or procedures.

19. Defendants deny the allegations and demand strict proof thereof.

20. Defendants deny the allegations and demand strict proof thereof. Defendants deny that the plaintiff is entitled to any of the relief as demanded in his prayer for relief.

Affirmative Defenses

Defendants assert that the allegations made against them fail to state claims for which relief can be granted.

Defendant Campbell is sued in his official capacity and as such is entitled to Eleventh Amendment Immunity as against plaintiff's claims for compensatory and/or punitive damages.

Defendant Campbell, at times pertinent to this

claim, was not affiliated with the Alabama Department of Corrections, and thus, neither participated in directly or otherwise, in the matters complained of by the plaintiff. He cannot be held liable to the plaintiff under 42 U.S.C. Section 1983.

The Alabama Department of Corrections is not a "person" for purposes of a complaint filed pursuant to 42 U.S.C. Section 1983.

The Alabama Department of Corrections is not liable to the plaintiff for the actions alleged in this complaint. Based upon plaintiff's own assertions, the Alabama Department of Corrections selected him for promotion and proceeded to finalize the promotion through the State Personnel Department. This promotion was rejected by the State Personnel Department for its failure to adhere to the requirements of the "Frazer" order. The Alabama Department of Correction, nor its personnel, had the authority to ignore or supercede the directive of the Alabama State Personnel Department with respect to plaintiff's promotion.

Respectfully submitted,

/s/
Andrew W. Redd RED001
General Counsel
Department of Corrections
P.O. Box 301501
Montgomery, Alabama 36130
(334) 353-3883

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

TIMOTHY D. POPE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 03-W-
STATE OF ALABAMA, ALABAMA DEPARTMENT OF CORRECTIONS, The ALABAMA STATE PERSONNEL DEPARTMENT, TOMMY G. FLOWERS, in his official capacity as Director of the Alabama State Personnel Department, and MICHAEL W. HALEY and DONAL CAMPBELL, In their official capacity as Commissioners of the Alabama Department of Corrections.	)	199-N
	)	
Defendants.	)	

Answer

Defendants, State of Alabama, Alabama State Personnel Department and Tommy Flowers, by and

through undersigned counsel, hereby file this Answer as follows:

I. Jurisdiction

1. This complaint is jurisdictional in nature and requires neither and admission nor a denial.

II. Venue

2. Admit that venue is proper in the Middle District of Alabama. Deny that any of the events described in the lawsuit are unlawful.

III. Parties

3. Admit that the Plaintiff is over the age of 19. Admit that the Plaintiff is a white male employee of the Alabama Department of Corrections. Can neither admit nor deny as to the Plaintiff's residence.

4. This paragraph is not applicable to Defendants State of Alabama, State Personnel Department, or Tommy Flowers.

5. This paragraph is not applicable to Defendants State of Alabama, State Personnel Department or Tommy Flowers.

6. This paragraph is not applicable to Defendants State of Alabama, State Personnel

Department or Tommy Flowers.

7. Admit that the State Personnel Department is an agency of the State of Alabama. Deny that the State Personnel Department is the Plaintiff's employer under the Civil Rights Act. Admit that the State Personnel Department is charged with the implementation and application of all laws, statutes and rules governing examinations, employment registers, and certification of candidates for all jobs under the State merit system.

8. Admit that Tommy Flowers is the Director of the Alabama State Personnel Department. Deny that any of the events contained in this complaint are unlawful.

IV. Facts

9. Admit that Plaintiff is a white male employed as a Correctional Officer I for the Alabama Department of Corrections. Can neither admit nor deny the particular location of employment of the Plaintiff.

10. This paragraph is not applicable to Defendants State of Alabama, State Personnel Department or Tommy Flowers.

11. This paragraph is not applicable to Defendants State of Alabama, State Personnel Department or Tommy Flowers.

12. This paragraph is not applicable to Defendants State of Alabama, State Personnel Department or Tommy Flowers.

13. Can neither admit nor deny.

14. Can neither admit nor deny.

15. This paragraph is not applicable to Defendants State of Alabama, State Personnel Department or Tommy Flowers. Can neither admit nor deny.

16. Admit that the Plaintiff could not be promoted because there was a higher ranking African-American candidate on the certificate of eligibles for Correctional Officer II. Admit that this restriction was due to the injunction issued against the State of Alabama under of *U.S. v. Frazer*, 317 F.Supp. 1079.

17. Admit that Plaintiff filed a complaint with the EEOC. Can neither admit nor deny as to when the Plaintiff received his Right-to-Sue letter.

Claim of Unconstitutionality

18. The Defendants hereby incorporate answers paragraphs 9-17 above as if fully set out herein.

V. Causes of Action

Count I

19. The Defendants hereby incorporate answers paragraphs 9-17 above as if fully set out herein. Deny that Defendants discriminated against the Plaintiff on the basis of his race in violation of the Title VII of the Civil Rights Act of 1964.

Count II

20. The Defendants hereby incorporate answers paragraphs 9-17 above as if fully set out herein. Deny that Defendants discriminated against the Plaintiff on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, enforceable by 42 U.S.C. 1983.

VI. Prayer for Relief

Defendants deny that the Plaintiff is entitled to any relief.

DEFENDANTS DENY EACH AND EVERY MATERIAL ALLEGATION CONTAINED HEREIN NOT SPECIFICALLY DENIED

DEFENSES

1. The Defendants are not Plaintiff's Employer

under the Civil Rights Act and as such are not subject to suit under Title VII.

2. The Defendants are entitled to Eleventh Amendment immunity for all damage and back pay claims brought pursuant to the Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. 1983.

3. Defendant State Personnel Department is entitled to Eleventh Amendment immunity for all claims for injunctive relief brought pursuant to 42 U.S.C. 1983.

4. Defendant State of Alabama is entitled to Eleventh Amendment immunity for all claims for injunctive relief brought pursuant to 42 U.S.C. 1983.

5. Defendant Tommy Flowers, in his official capacity, is entitled to Eleventh Amendment immunity for all claims for retroactive injunctive relief.

6. Plaintiff failed to allege that the Defendants intentionally discriminated against him.

7. Concerning the actions alleged herein, the Defendants, at all times, were acting pursuant to a court injunction imposed on the State of Alabama in *US. v Frazer*, 317 F.Supp. 1079.

/s/

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DISTRICT COURT DOCKET NO. 20, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, EXHIBIT D: *FRAZER* DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THE *FRAZER* LITIGATION

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
TIMOTHY D. POPE,	)
	)
Intervenor-Plaintiff,	) CIVIL
	) ACTION
JOHNNY REYNOLDS, et al.,	) NO. CV-
	) 68T-2709-N
Intervenor-Plaintiffs,	)
	) Judge
v.	) Thompson
	)
TOMMY G. FLOWERS, et al.,	)
	)
Defendants	)
	)

DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON JOINT MOTION TO TERMINATE NO-BYPASS PROVISIONS OF INJUNCTIVE ORDERS (DOC. 634)

COME NOW Defendants in the above-styled case, and pursuant to Federal Rule of Civil Procedure 56, move this court for summary judgment on the Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. No. 634) (hereinafter, the "Joint Motion to Terminate").[1] As grounds for this motion, Defendants state that there is no genuine issue of material fact and that they are entitled to summary judgment as a matter of law.

This motion is based on the following:

Defendants Memorandum of Law in Support of Their Motion for Summary Judgment on Defendants' Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. No. 634), filed contemporaneously herewith;

The pleadings filed to date;

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[1] After granting the Joint Motion to Terminate under a preliminary injunction standard, this Court set the Joint Motion for final submission and summary disposition pursuant to Rule 56 of the Federal Rules of Civil Procedure in its April 29, 2005 Order. (Doc. No. 724) at 4. Consequently, Defendants submit this Motion for Summary Judgment in tandem with its original Joint Motion to Terminate as directed by the Court.

The reports submitted by Defendants' experts Drs. Joan Haworth and Janet Thornton (Doc. Nos. 635, 675, 697);

The deposition testimony of Defendants' experts Joan G. Haworth, Ph.D. and Janet R. Thornton, Ph.D.;

The affidavit of Janet R. Thornton, Ph.D.; and

The deposition testimony of the *Reynolds/Crum* Intervenor's expert Edwin Bradley, Ph.D.

In further support of this motion, Defendants state as follows:

1. The no-bypass provision of the *Frazer* injunctions classifies candidates for State employment and promotion on the basis of race. The rule of mandates that a higher ranked African-American candidate cannot be bypassed to select a lower ranked non-African-American candidate, unless the African-American candidate refuses the position, is unavailable, or is found to be unqualified for the position. This race-conscious, indeterminate, across-the-board rule has operated continually absent any court review or reauthorization for over 35 years.

2. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, Defendants have asked the Court to modify the Frazer injunctions by

eliminating the no-bypass rule based on a significant change in circumstances (both factual and legal) that justifies modification under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). With respect to the significant change in legal circumstances, following implementation of the no-bypsass rule in the 1970s, the Supreme Court, followed by the Eleventh Circuit Court of Appeals, adopted a strict scrutiny standard requiring that all race-conscious remedies be narrowly tailored and serve a compelling governmental interest. In the instant case, the no-bypass rule cannot survive strict scrutiny because it no longer promotes a compelling governmental interest. Today, there is no evidence of the pervasive, systematic, and obstinate discriminatory conduct that characterized the States Defendants' employment practices in the 1960s and 70s. To the contrary, as this Court has found, there has been a "substantial positive change in the racial makeup of the government of the State of Alabama after the uninterrupted implementation of the no-bypass rule for 35 years." *See* 04/29/05 Order (Doc. No. 723) at 7-8. In fact, the Court preliminarily enjoined continued application of the no-bypass rule based, in part, on its conclusion that "continued implementation of the no-bypass rule would cause irreparable injury to all state employees and applicants for state jobs, and thus would be against the public interest..." *Id.* at 8. Furthermore, the same undisputed facts that demonstrate a lack of a

compelling governmental interest also support modification under the changed factual circumstances prong of *Rufo*.

3. The lack of any compelling governmental interest is further demonstrated by the fact that the discriminatory selection practices that justified implementation of the Frazer no-bypass rule have ceased, and the effects of such practices have been eliminated. Specifically, with respect to selections made from the certificates of eligibles ("COE"), i.e., the only step in the selection process to which the no-bypass rule applies, the evidence establishes that the State has demonstrated its good faith in implementing an exemplary selection process substantially free of discrimination and that the State Defendants consistently have selected African-Americans from the COEs at rates consistent with or greater than their representation on the COEs. More tellingly, even when selections are not subject to the no-bypass rule, e.g., when the COE consists of a single band of candidates, all of whom have the same score and rank, the State Defendants have selected African-Americans at rates consistent with or greater than their representation on the COEs. In sum, there is no evidence supporting a compelling government interest justifying continued application of the no-bypass rule.

4. Additionally, even if the Court determines that a compelling governmental interest exists, the

no-bypass rule remains facially unconstitutional because it is not sufficiently narrowly tailored in that it lacks any durational limit or provision for court review or reauthorization; it is inflexible in its application; and it has an intolerable impact on innocent third parties.

5. Defendants' request for the complete elimination fo the no-bypass rule is also suitably tailored and not overbroad because any remedy short of total elimination would perpetuate an existing constitutional violation.

6. Finally, Defendants are not required to establish perfect compliance or elimination of all discrimination with respect to implementation of the no-bypass rule. As long as human beings are making selections in employment, perfect compliance, although ideal, is unrealistic, particularly when dealing with thousands of selections made by multiple decision-makers in many agencies and departments geographically dispersed throughout 67 counties of the State of Alabama. To the extent that there remain isolated and anecdotal examples of discrimination and attempts to circumvent or otherwise violate the no-bypass rule, such violations are best addressed through traditionally federal remedies such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, and the Civil Rights Acts of 1866. 42 U.S.C.A. § 1981.

WHEREFORE, PREMISES CONSIDERED, Defendants are entitled to summary judgment to Fed. R. Civ. P. 56 on their Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. No. 634).

Respectfully submitted this 9th day of September, 2005

s/Christopher W. Weller
Christopher W. Weller
Deputy Attorney General and Liaison Counsel for the Office of the Attorney General of the State of Alabama

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DISTRICT COURT DOCKET NO. 20, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, EXHIBIT E: EXCERPTS OF *FRAZER* DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT IN THE *FRAZER* LITIGATION

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
TIMOTHY D. POPE,	)
	)
Intervenor-Plaintiff,	) CIVIL
	) ACTION
JOHNNY REYNOLDS, et al.,	) NO. CV-
	) 68T-2709-N
Intervenor-Plaintiffs,	)
	) Judge
v.	) Thompson
	)
TOMMY G. FLOWERS, et al.,	)
	)
Defendants	)
	)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' JOINT MOTION TO TERMINATE NO-BYPASS PROVISIONS OF INJUNCTIVE ORDERS (DOC. 634)

COME NOW Defendants in the above-styled case, and submit this Memorandum of Law in Support of Motion for Summary Judgment on Defendants' Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. No. 634) (hereinafter, the "Joint Motion to Terminate").

I. SUMMARY OF ARGUMENT

The no-bypass provision of the *Frazer* injunctions classifies candidates for State employment and promotion on the basis of race. The rule mandates that a higher ranked African American candidate cannot be bypassed to select a lower ranked non-African-American candidate, unless the African-American candidate refuses the position, is unavailable, or is found to be unqualified for the position. This race-conscious, indeterminate, across-the-board rule has operated continually without any court review or reauthorization for over 35 years.

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, Defendants have asked the Court to modify the *Frazer* injunctions by

eliminating the no-bypass rule based on a significant change in circumstances (both factual and legal) that justifies modification under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). With respect to the significant change in legal circumstances, following implementation of the no-bypass rule in the 1970's, the Supreme Court (and later the Eleventh Circuit Court of Appeals) adopted a strict scrutiny level of review requiring that all race-conscious remedies be narrowly tailored and serve a compelling governmental interest.

In the instant case, the no-bypass rule cannot survive strict scrutiny because it no longer promotes a compelling governmental interest. Today, there is no evidence of the pervasive, systematic, and obstinate discriminatory conduct that characterized the State Defendants' employment practices in the 1960s and 70s. To the contrary, as this Court has found, there has been a "substantial positive change in the racial makeup of the government of the State of Alabama after the uninterrupted implementation of the no-bypass rule for 35 years." *See* 04/29/05 Order (Doc no. 723) at 7-8. In fact, the Court preliminarily enjoined continued application of the no-bypass rule based, in part, on its conclusion that "continued implementation of the no-bypass rule would cause irreparable injury to all state employees and applicants for state jobs, and thus would be against

the public interest. . . ." *Id.* at 8. Furthermore, the same undisputed facts that demonstrate a lack of a compelling governmental interest also support modification under the changed factual circumstances prong of *Rufo*.

The lack of any compelling governmental interest is further demonstrate by the fact that the discriminatory selection practices that justified implementation of the *Frazer* no-bypass rule have ceased, and the effects of such practices have been substantially eliminated. Specifically, with respect to selections made from the certificates of eligibles ("COEs"), i.e., the *only* step in the selection process to which the no-bypass rule applies, the evidence establishes that, since at least 1982, the State has demonstrated its good faith in implementing an exemplary selection process substantially free of discrimination and that the State Defendants consistently have selected African-Americans from the COEs at rates consistent with or greater than their representation on the COEs. More tellingly, even when selections are not subject to the no-bypass rule, e.g., when the appointing agency can select any candidate from a band regardless of race, the State Defendants have selected African-Americans at rates consistent with or greater than their representation on the COEs. In sum, there is no evidence supporting a compelling governmental interest justifying continued application of the no-bypass rule.

Additionally, even if the Court determines that a compelling governmental interest exists, the no-bypass rule remains facially unconstitutional because it is not sufficiently narrowly tailored because it lacks any durational limit or provision for court review or reauthorization; it is inflexible in its application; and it has an intolerable impact on innocent third parties.

Furthermore, Defendants need not demonstrate perfect compliance or elimination of all discrimination with respect to implementation of the no-bypass rule. As long as human beings are making selections in employment, perfect compliance, although ideal, is unrealistic, particularly when dealing with thousands of selections made by multiple decision-makers in many agencies and departments geographically dispersed throughout the 67 counties of the State of Alabama. To the extent that there remain isolated and anecdotal examples of discrimination, such violations are best addressed through traditional federal remedies such as Title VII and § 1981.

Finally, Defendants' request for the complete elimination of the no-bypass rule is also suitably tailored and not overbroad because any remedy short of total elimination would perpetuate an existing constitutional violation.

For all of these reasons, as set forth more fully below, Defendants are entitled to summary

judgment on their Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. no. 634).

* * *

IV. ARGUMENT

The Joint Motion to Terminate the No-Bypass Rule should be granted for three reasons. First, as required by *Rufo*, the parties can show a substantial change in the applicable law since the implementation of the no-bypass rule in that the rule is not subject to strict scrutiny review. Pursuant to the strict scrutiny standard, the no-bypass rule no longer serves a compelling governmental interest as established by the dramatic and steady change in the racial composition of the State workforce during the intervening 35 years. Additionally, the evidence establishes that Defendants substantially have eliminated discrimination with respect to selections being made from the certificates of eligibles such that the underlying purpose of the no-bypass injunction no longer exists. Second, the no-bypass rule is facially unconstitutional because it is not "narrowly tailored" because it is a race-conscious, indeterminate, across-the-board remedy that has not been reviewed by any court in several decades. Third, the same facts demonstrating a lack of any compelling governmental interest also independently establish a substantial change in

factual circumstances justifying elimination of the no-bypass rule.

A. Modification Is Required Because Continued Application Of The No-Bypass Rule Will Perpetuate A Constitutional Violation.

One of the justifications for modification under *Rufo* is a change in legal circumstances. The legal landscape as it pertains to race-conscious remedial relief has changed dramatically since the implementation of the no-bypass rule in 1976. In fact, when the Court implemented the no-bypass injunction, there was limited jurisprudence on race-conscious remedial relief. Although the current "strict scrutiny" standard for race-conscious governmental action is firmly established, a review of the history and evolution of that standard since the Court issued the *Frazer* decree demonstrate a significant change in legal circumstances requiring the elimination of the no-bypass rule.

1. The History Of The Strict Scrutiny Standard

* * *

Several years later, a majority of the Court resolved the issue regarding the appropriate level of scrutiny applicable to race-conscious governmental action in *Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).* In *Croson*, the City of Richmond

implemented a minority set-aside program that awarded 30% of its contracting work to minority-owned businesses. The Court struck down the policy as unconstitutional based on an application of strict scrutiny. The Court held that, pursuant to the strict scrutiny standard, an affirmative action plan must be based upon a "compelling governmental interest" and must be "narrowly tailored" to achieve that interest. *Id.* In adopting this standard, the Court reasoned that the compelling governmental interest requirement was designed "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* at 493.

Approximately a year later, however, the Supreme Court issued its opinion in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990), wherein it inexplicably back-tracked on the strict scrutiny principles announced in *Croson* by applying an intermediate level of scrutiny in upholding two so-called "benign" *federal* race-based policies against a Fifth Amendment challenge. The ruling was surprising given the fact that the Court had just applied a strict scrutiny standard in *Croson* to similar racial classifications enacted by a state. *Id.* at 564-65. The Court eventually overruled *Metro Broadcasting* in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and unambiguously announced that "all racial classifications, imposed by whatever federal, state,

or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227. The Court further held that "such classifications are constitutional only if they are narrowly tailored measures that further compellling governmental interests." *Id.*

In 1994, citing the strict scrutiny standard announced in *Croson*, the Eleventh Circuit found unconstitutional a consent decree in *Ensley Branch, NAAPC v. Seibels*, 31 F.3d 1548, 1564 (11th Circ. 1994) based on the same change of law present in the instant case:

> The district court approved the City and Board decrees in 1981, thirteen years ago. The Supreme Court had, at that time, just begun to address the constitutionality of affirmative action. Since then, the Court has repeatedly revisited this issue, substantially changing affirmative action jurisprudence. Most significantly, [*Croson*] established that voluntary, race-conscious, local-government affirmative action programs are subject to strict scrutiny. Prior to *Croson*, "a majority of the Supreme Court had never joined in one opinion on the constitutionality" of such programs. *Croson* sufficiently altered the legal landscape to warrant modifications to

> the present decrees under *Rufo*. As we discuss later in this opinion, *Croson* has rendered parts of the decrees unconstitutional.

In other words, after *Croson*, the Supreme Court's position on affirmative action was sufficiently settled to provide the grounds for modification under *Rufo* and Rule 60(b) for changed legal circumstances. *See also Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny).

In sum, since this Court originally implemented the *Frazer* decrees, there has been a substantial change in the law in that the Supreme Court has settled on strict scrutiny as the appropriate level of review regarding racial classifications imposed by governmental action.

* * *

3. The No-Bypass Rule Is Not Narrowly-Tailored

a. The No-Bypass Rule Is Not Narrowly Tailored Because It Has An Unlimited Duration

Strict scrutiny also requires that the no-bypass rule be narrowly tailored to address the compelling governmental interest. In *Ensley Branch*, the Eleventh Circuit articulated four factors to consider in determining whether an affirmative action plan is narrowly tailored:

> To ensure that affirmative action programs do not got too far, however, they must be scrutinized strictly. In making this evaluation, we consider: (1) "the 'necessity for the relief and the efficacy of alternative remedies'"; (2) "the flexibility and duration of the relief, including the availability of waiver provisions'"; (3) "the 'relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of [innocent third parties.]'"

Ensley Branch, 31 F.3d at 1569 (citations and quotation omitted).[25] *See also Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989).

In the instant case, however, even if the Court determines that the *Crum/Reynolds* Intervenors can show that the no-bypass rule continues to be justified by a compelling, it is not narrowly tailored because it has an unlimited

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[25] These factors are drawn from the plurality opinion in *United States v. Paradise*, 480 U.S. 149 (1987). *See Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234, 1252 (11th Cir. 2001).

duration; it is inflexible in its application; and it has an intolerable impact on innocent third parties.

The Supreme Court cautioned against the use of racial classifications lacking temporal limits in *Grutter v. Bollinger*, 539 U.S. 306 (2003):

> We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.

Id. at 341-42.

The Eleventh Circuit recently echoed *Grutter*'s caution against the use of race-conscious preferences of unlimited duration in *Virdi v. DeKalb County School.*, 2005 WL 1389942 (11th Cir. June 13, 2005). In *Virdi*, the plaintiff architect, who was an Asian-American of Indian descent, challenged the constitutionality of the school district's use of a

Minority Vendor Involvement Program ("MVP"), which adopted annual participation goals for minorities in the awarding of architectural contracts to increase minority involvement. Although the district court upheld the constitutionality of the MVP, the Eleventh Circuit reversed on appeal. The Court, applying the strict scrutiny standard, found the MVP facially unconstitutional for lack of narrow tailoring because its racial goals had an unlimited duration:

> The unlimited duration of the MVP's racial goals also demonstrates a lack of narrow tailoring. As the Supreme Court has stated, "race conscious... policies must be limited in time." *Grutter*, 539 U.S. at 342, 123 S.Ct. at 2346; *see also Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999) (citing *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987)) (listing duration as a factor to consider when assessing whether a race-conscious policy is narrowly tailored). While the District's effort to avoid unintentional discrimination should certainly be ongoing, its reliance on racial classifications should not.
>
> Because the government interest at stake in this case could be achieved through race-neutral means, and because the racial classifications in question are not temporally limited, the MVP's racial goals cannot

> withstand strict scrutiny. The program is facially unconstitutional, and the district court erred in granting Defendants' motion for partial summary judgment on this issue.

2005 WL 1389942 at *5.

Similarly, the Fourth Circuit addressed the durational issue in *Hayes v. North State Law Enforcement Officers Assn.*, 10 F.3d 207 (4th Cir. 1993), finding that the City of Charlotte's use of numerical goals in the promotion of police officers was unconstitutional because it was not narrowly tailored to accomplish its asserted purpose of achieving effective law enforcement through diversity. In addition to the City's failure to present evidence that it considered any less restrictive alternatives to accomplish its goal, it also failed to offer any evidence regarding the duration of its use of racial preferences or evidence that the city regularly re-evaluated its use of racial preferences. As stated by the Court:

> The use of racial preferences must be limited so that they do not outlast their need; "they may not take on a life of their own." *Maryland Troops*, 993 F.2d at 1076; *see also Paradise*, 480 U.S. at 178-79, 107 S.Ct. at 1070) (plurality opinion). As the Supreme Court held in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 639-40, 107 S.Ct. 1442, 1455-56, 94 L.Ed.2d

> 615 (1987), even when race can be taken into account to *attain* a balanced worked force, racial classifications may not be employed to *maintain* a balanced work force. The City has offered no evidence regarding the duration of its use of racial preferences. Furthermore, it has offered no evidence indicating that the City regularly reevaluates its use of racial preferences to insure that such preferences continue to be justified by some compelling state interest. Indeed, the City's efforts suffer from the same fatal defect recognized with regard to the role model theory in *Wygant*: they have no "logical stopping point." 476 U.S. at 275, 106 S.Ct. at 1847 (plurality opinion).

10 F.3d at 216-17. (emphasis in original).[26] *See also Tuttle v. Arlington County School Bd.*, 195 F.3d 698, 706 (4th Cir. 1999) (holding that a narrowly tailored race-conscious policy "cannot [be] continued in perpetuity, but must have a 'logical stopping point' ").

In sum, as illustrated by *Grutter*, *Virdi* and *North State*, racial preferences of unlimited duration having no logical stopping point and no

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[26] *See also Belk v. Charlotte-Mecklenburg Bd. Of Ed.*, 269 F.3d 305, 345 (4th Cir. 2001) (finding minority quotas for a magnet school program unconstitutional because it was not narrowly tailored due to its unlimited duration, lack of flexibility and burdened on onnocent children and their families).

provision for periodic review are facially unconstitutional because they are not narrowly tailored.

In the instant case, the no-bypass rule clearly suffers from this constitutional infirmity. As this Court essentially recognized in its April 29, 2005 Order, the no-bypass rule is a racial preference of unlimited duration with no logical stopping point that cannot be reconciled with the dictates of *Adarand*:

> On the other hand, the court is confronted with the following reality: First, the no-bypass rule is a race-conscious provision and as such, must meet 'strict-scrutiny' standards and must be narrowly tailored,' *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995); if logic and common sense are to apply, the no-bypass rule cannot be both narrowly tailored and everlasting. Second, the rule has been in effect for approximately 35 years without an independent court review to determine if it continues to meet legal requirements. Because the rule cannot be everlasting, this circumstance is impermissible; in other words, the rule simply cannot continue without a court finding that it continues to meet the demanding requirements for race-conscious relief.

04/29/05 Order (Doc. No. 723) at 5-6. This Court has further found that "the continued implementation of the race-conscious, indeterminate, across-the-board no-bypass rule without any recent court review and reauthorization during its extended existence, is, on its face, unconstitutional." 05/20/05 Order (Doc. No. 735) at 3-4.[27]

Even after 35 years of uninterrupted application, there is no finish line, logical stopping point or objective goal (not even an aspirational goal) by which the State Defendants can measure with particularity their progress in eliminating racial discrimination in the State's Merit Systems employee selection procedures and, in particular, selections made from the COEs, i.e., the only part of the selection process to which the no-bypass rule applies. If the no-bypass rule is perceived as the means to eliminate all discrimination in the State's entire selection procedure, it does not satisfy the narrow-tailoring requirement of *Adarand*.

Thus, notwithstanding the existence of a compelling governmental interest, the no-bypass rule is facially unconstitutional because it is not narrowly tailored due to its unlimited duration. Accordingly, Defendants are entitled to summary

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[27] In contrast with the instant case, in *United States v. Paradise*, 480 U.S. 149 (1987), the Supreme Court specifically focused on the limited duration of the temporary one-for-one requirement: "Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotions of qualified whites." 480 U.S. at 183.

judgment on their Joint Motion to Terminate (Doc. no. 634).

b. The No-Bypass Rule Is Not Narrowly Tailored Because It Is Inflexible

It is also well established that in determining whether a race-conscious remedy is narrowly tailored, the court must consider the flexibility of the relief, including the availability of waiver provisions. *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion of Brennan, J.). In fact, the Supreme Court has specifically focused on this flexibility factor in affirming race-conscious remedies and policies. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding Michigan Law School's admissions policy only because it considered race a "soft variable" in its selection procedures); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (upholding a one-black-for-one-white hiring requirement only because it was flexible and temporary). The Eleventh Circuit likewise has considered the importance of flexible application in its review of race-conscious programs. For example, in *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 910 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990), the court upheld a minority business enterprise plan carefully crafted by the county to minimize the burden on innocent third parties. Under the program, persons who bid for certain county contracts were required to make a good-faith

effort to subcontract a stated percentage of the job to minority businesses. *Id.* at 911. Although the program included a 25% minority participation goal, it permitted the county to grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses. *Id.* at 910-11. In the first year of the program's operation, the county had granted good-faith waivers to each of the bidders who had failed to reach the 25% goal. *Id.* at 911. After the district court entered summary judgment against the county, the Eleventh Circuit reversed, holding that the plan was sufficiently flexible to pass constitutional muster as to warrant a trial. *Id.* at 917-18.[28]

In contrast, the no-bypass rule imposes

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[28] *See also Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234, 1244 (11th Cir. 2001) (holding that state university's freshman admissions policy violated equal protection and was not sufficiently narrowly tailored because it was inflexible and mechanically awarded bonus points to each non-white applicant, regardless of that applicant's potential overall contribution to diversity); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557 (11th Cir. 1994) ("In determining if degree of racial preference is tied to effects of past discrimination by government employer, court must analyze flexibility and duration of remedy as well as relationship of numerical goals to relevant labor market."); *Howard v. McLucas*, 871 F.2d 1000, 1006 (11th Cir.), *cert. denied*, 493 U.S. 1002, 1008 (1989) (holding that affirmative aciton, when allowed must be flexible, reasonably related to the pool of qualified minorities, and impose no undue burden on innocents).

inflexible, race-based, hiring and promotions criteria on virtually every agency and department of the State of Alabama. As established by the plain language of the rule, a higher ranked African-American candidate on a COE must be appointed over a lower ranked non-African-American candidate unless the African-American candidate is unfit or unavailable. *Frazer I*, 317 F. Supp. at 1091. Beyond the minimum qualifications required for the position, as long as the highest-ranked candidate on a mixed-race COE is African-American, a lower ranked non-African-American candidate cannot be selected because the no-bypass rule does not permit the appointing agency to consider differences in applicant characteristics such as skill level, educational attainment, prior experience, time in grade, age, salary or performance scores. For example, as set forth in the depositions and the June 1, 2004 Response Report of Drs. Haworth and Thornton, the undisputed evidence establishes that internal candidates (already State employees) for specific jobs have a statistically significant edge in the selection process over external candidates (non-State employees):

> When internal candidates (already State employees) are selected to fill a position, the majority (87%) were already working in the appointing agency, reflecting the fact that the agency-specific human capital was an asset for these candidates. That is 49% of the *candidates* on lists of certified eligible

> candidates from whom an internal candidate was selected were already employed by the appointing agency but 87% of these internal selections had such experience. If agency-specific human capital was a factor in the decision-making, we would predict that 49% of the internal selections would have been those with this experience. Instead, we see that nearly twice the number of candidates with such experience was selected than would be predicted if agency experience did not matter. This difference between the actual and predicted number selected is statistically significant, at a level of 96 standard deviations.[29]

ERS Report III (Doc. No. 697), Ex. H, at 6-7; see also 08/03/05 Thornton Dep., Ex. C, at 147-153, 305-06. In other words, if intra-agency experience was not a relevant selection factor, one would expect 49% of the internal selections to have such experience. However, the fact that 87% of the selections were internal to the appointing agency establishes that these candidates are more likely to be selected, regardless of race.

Notwithstanding the fact that agencies regularly consider this race-neutral, "agency-

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[29] Drs. Haworth and Thornton further determined that of the 1,556 class codes for which a selection was made over the 21-year period, almost 600 had selections that were only intra-agency. ERS Report III (Doc. no. 697), Ex. H, at 7, n. 21.

specific human capital" factor in the selection process, under the no-bypass rule, when the highest ranked candidate on a mixed-race COE is African-American, the no-bypass rule prohibits the selection of the lower ranked non-African-American candidate even if the agency considers the non-African-American candidate a better candidate for the position because he is a current agency employee who may have personal familiarity with the daily operations of the job classification at issue. Thus, in some circumstances, the no-bypass rule is overbroad because it prohibits a selecting agency from considering certain non-discriminatory factors when making selection decisions.

The inflexibility of the no-bypass rule is further illustrated by the following example. Assume that an appointing agency is selecting an applicant for an Accountant I position. The top-ranked candidate on the COEs is African-American. The second-ranked candidate is non-African-American but, unlike the African-American candidate, he has a CPA certification. Assume also that the difference in the exam scores that account for the ranking of the two candidates is inconsequential. Given those facts, if the non-African-American candidate has a CPA certification (clearly a non-discriminatory factor), and all other things being equal, presumably would be more productive and possess a higher level of qualifications than the non-CPA accountant, the no-bypass rule prohibits the appointing agency is faced

with a mixed-race COE and the highest-ranked candidate is African-American, the no-bypass rule compels the appointing agency to ignore significant differences in nondiscriminatory factors among African-American and non-African-American candidates.

In contrast, if all the candidates on a COE are of one race, then the no-bypass rule does not preclude the appointing agency from selecting a lower ranked candidate over a higher ranked candidate. Furthermore, under the no-bypass rule, the appointing agency can bypass a higher ranked non-African-American applicant to select a lower ranked African-American for any reason, including its consideration of nondiscriminatory factors such as those discussed above. In other words, the no-bypass rule is a one-way street. Clearly, the inability of an agency to consider other significant nondiscriminatory factors in the selection process, except when all the candidates on the COEs are of one race, illustrates the rule's absurd inflexibility.[30]

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[30] The inflexibility of the no-bypass rule is further demonstrated by the fact that it applies across-the-board to all State agencies without regard to the relevant labor market. This fact, as established by the workforce composition statistics set forth in the expert reports submitted by Defendants (discussed above) remains undisputed. *See also Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977) (holding that the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market).

In sum, because the no-bypass rule lacks any semblance of flexibility, it is not narrowly tailored to achieve a compelling governmental interest and, thus, does not pass constitutional muster.

For this additional reason, Defendants are entitled to summary judgment on their Joint Motion to Terminate.

c. The No-Bypass Rule Is Not Narrowly Tailored Because It Has An Intolerable Impact on Innocent Third Parties

Finally, in addressing the narrow tailoring requirement, the Court must consider whether the impact of the remedial relief upon third parties is unduly burdensome. *See Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1557 (11th Cir. 1994); *Engineering Contractors Ass'n of South Fla., Inc.*, 943 F. Supp. 1546, 1583 (S.D. Fla. 1996). In attempting to eliminate the vestiges of past discrimination against persons of one race, the court must minimize the impositions of new discriminations on persons of other races. *See, e.g., Paradise*, 480 U.S. at 171.

In the case at bar, the no-bypass rule is not narrowly tailored because it impermissibly adversely impacts innocent third parties. In particular, as demonstrated by the example set forth above, a rule that allows an agency to bypass

a higher ranked candidate (based on its consideration of other significant non-discriminatory factors) in favor of a lower ranked candidate in all cases, except when the higher ranked candidate is African-American and the lower ranked candidate is non-African-American, fails to value the individual. In other words, although the lower ranked non-African-American candidate may have specific race-neutral characteristics that may make him or her the better candidate for the position than the higher ranked competing African-American candidate, the no-bypass rule prohibits an agency from considering those other non-discriminatory factors when making the selection. In sum, the no-bypass rule prevents non-African-American candidates on mixed-race COEs from competing on an equal basis with their African-American counterparts. *Compare with Cone Corp. v. Hillsborough County*, 908 F.2d 908, 910 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990) (upholding a minority business enterprise plan that included a good-faith waiver provision to minimize the burden on innocent third parties). Therefore, the no-bypass rule unduly burdens innocent third parties and, thus, is not narrowly tailored.

For this additional reason, Defendants are entitled to summary judgment on their Joint Motion to Terminate.

* * *

V. CONCLUSION

It is clear from the undisputed evidence that the racial composition of the State's workforce has changed dramatically since the Court first implemented the no-bypass rule over 35 years ago. Defendants also have demonstrated an established evidentiary record of selecting African-American candidates at rates higher than their representation on the certificates of eligibles. Each of these significant changes in factual circumstances establishes that there no longer exists a compelling governmental interest justifying continued application of the race-conscious no-bypass rule. The evidence further shows that, even when the no-bypass rule does not apply to a particular selection decision, the State Defendants consistently have selected African-Americans in percentages consistent with the racial composition of those COEs. In sum, the no-bypass rule has accomplished its intended goal of substantially eliminating the practice of by-passing higher ranked African-American candidates. Continued application of the rule in the absence of any continuing compelling interest would only undermine the State's progress by perpetuating a constitutional violation.

Additionally, by definition, a narrowly tailored race-conscious remedy cannot continue in perpetuity, especially in the absence of any judicial review. Because there is no logical stopping point, the no-bypass rule is not narrowly tailored. The lack

of narrow tailoring is also evidenced by the lack of flexibility in the application of the rule and the intolerable impact on innocent third parties. Thus, the no-bypass rule fails to pass constitutional muster, and a suitably tailored modification to the *Frazer / Ballard* injunctions warrants its complete termination.

For all these reasons, the State Defendants are entitled to summary judgment on their Joint Motion to Terminate No-Bypass Provisions of Injunctive orders (Doc. no. 634).

Respectfully submitted this 9th day of September, 2005.

s/Christopher W. Weller
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Doc. No. 32, Ex. A: Affidavit of Alice Ann Byrne in Opposition To Plaintiff's Motion For Partial Summary Judgment (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

TIMOTHY POPE,	)
	)
Plaintiff,	)
	) Civil Action No. 2:03-cv-
	) 0199-ID
STATE OF ALABAMA,	)
et al.	) JUDGE IRA DEMENT
	)
Defendants.	)

AFFIDAVIT OF ALICE ANN BYRNE

Come now, Alice Ann Byrne, who first being duly sworn, deposes and states as follows:

1. I am over the age of eighteen (18) and have personal knowledge of the matters set forth herein.

2. I am currently employed as General Counsel with the Alabama State Personnel Department.

3. The State of Alabama and its various

agencies have operated subject to the *Frazer* injunctions since the early 1970s. The United States Department of Justice has monitored the State of Alabama's compliance efforts in this action since the inception of the case, including the State's implementation of the no-bypass rule in the selection of State Merit Systems employees.

4. In early May 2002, the State of Alabama tasked Drs. Joan Haworth and Janet Thornton of the ERS Group to examine the racial composition of the workforce as well as the racial pattern of selections with the State workforce between 1983 and 2002 to determine if there was still a need for the no-bypass rule that has been mandated for Merit Systems employee selections by the State. Dr. Haworth is a former faculty member in the Department of Economics at Florida State University, and Dr. Thornton is a labor economist at ERS Group who specializes in statistical analysis of employment practices.

5. Drs. Haworth and Thornton proposed several analyses that concerned different types of data sets over many years. The project consumed the full-time efforts of several ERS economists, computer programmers and research associates for approximately a two-month period at a cost of several hundred thousand dollars. From August through September, 2002, ERS assembled the necessary workforce data and prepared their initial draft report. Upon completion of their work, Drs.

Haworth and Thornton shared their analyses with me. In their analyses, Drs. Haworth and Thornton found that there had been striking increases in the representation of African-American employees in the State workforce and among managers and supervisors who exercise decision-making authority. They further found that the rate of selections of African-American candidates from certificates of eligibles exceeded the predicted number of African-American selections regardless of the applicability of the no-bypass rule to the selection process.

* * *

10. After extensive consultations, and based on the Department of Justice's independent review of the ERS Group Report, the State Defendants and the United States filed a Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders on May 20, 2003, asking the Court to modify the *Frazer* injunctions by vacating the no-bypass rule.

11. At the time I commenced discussions with the United States in early-February, 2003 regarding the filing of a joint motion to vacate the no-bypass rule, Intervenor Pope had not filed his motion to intervene in this action. Moreover, prior to receiving the February 24, 2003 telephone call from Mr. Fitzpatrick, I was unaware of any efforts by Pope's counsel regarding his intention to intervene and to ask the Court to vacate the by-bypass rule. Furthermore, Pope's efforts had no

effect whatsoever on the State's decision to file the joint motion seeking termination of the no-bypass rule. Rather, the United States and the State of Alabama filed their joint motion without regard to Intervenor Pope's actions.

FURTHER, AFFIANT SAYETH NOT

/s/ _____

Alice Ann Byrne

STATE OF ALABAMA)
COUNTY OF MONTGOMERY)

I, the undersigned, a Notary Public in and for said County and State, hereby certify that ALICE ANN BYRNE, whose name is signed to the foregoing Affidavit and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, she voluntarily executed the same on the day the same bears date.

Given under my hand and seal this the 6th day of September, 2007.

/s/ _____
NOTARY PUBLIC

My Commission Expires: 8/2/09

Doc. No. 51: Defendants' Motion For Dismissal Or Summary Judgment

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

TIMOTHY POPE,	)
	)
Plaintiff,	)
	) Civil Action No. 2:03-cv-
	) 0199-ID
STATE OF ALABAMA, *et al.*	) JUDGE IRA DEMENT
	)
	)
Defendants.	)

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

COME NOW Defendants and, pursuant to Rules 12(b)(6) and 56(c) of the Federal Rules of Civil Procedure, respectfully move this Court to dismiss Plaintiff's Complaint in its entirety or, in the alternative, to enter summary judgment in favor of Defendants on all claims asserted therein. Defendants' motion is based on the pleadings filed to date as well as the memorandum of law and exhibits thereto submitted contemporaneously herewith.

In further support of this motion, Defendants state as follows:

1. Plaintiff Timothy Pope is a white male employee of ADOC. At the time of the acts made the basis of his Complaint, Pope was employed as a Correctional Officer 1 at ADOC's Draper Correctional Facility located in Montgomery County, Alabama. Pl's Compl. (Doc. No. 1) at 9. In his Complaint, Plaintiff Pope alleges that he was discriminated against by State Defendants after he was denied a promotion by the Alabama Department of Corrections ("ADOC") as a result of its application of the no-bypass rule provision of the injunctions entered by the Court in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) and in the *Frazer* Court's successive orders. *Id.* at ¶ 18.

2. With respect to the specific promotion at issue, the undisputed facts establish that, on or about August 20, 2002, ADOC notified Pope that his name was on the certificate of eligible candidates for promotion to the classification of Correctional Officer II. *Id.* at ¶ 10. The position ADOC intended to fill was located at the Bibb Correctional Facility in Bibb County, Alabama. *Id.*

3. On August 30, 2002, ADOC advised Pope *viá* letter to contact the Bibb facility Warden, Cheryl Price, if he desired to be considered for the Correctional Officer II position. *Id.* Pope did so and was interviewed for the position on or about

September 3, 2002. *Id.* at 11.

4. On September 19, 2002, Warden Price contacted Pope by telephone and offered his the Correctional Officer II position, which he accepted. *Id.* at ¶ 12. ADOC then forwarded the necessary documentation to SPD for processing. Upon processing, SPD discovered that there was a female African-American candidate ranked higher than Pope on the COE for the Correctional Officer II position. Consequently, SPD advised ADOC and Warden Price that the promotion could not be processed because it would violate the no-bypass rule provision of the injunctions entered by the Court in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) and in the *Frazer* Court's successive orders. Pl's Compl. (Doc. No. 1 at ¶ 16.

5. On September 25, 2002, Warden Price contacted Pope and rescinded the promotion offer. Pl's Compl. (Doc. No. 1) at ¶ 14. As set forth in a December 4, 2002 letter provided by ADOC's General Counsel to Pope, Defendants admit that Pope's appointment was rescinded solely to comply with the no-bypass rule of the *Frazer* injunctions. *See* 12/04/02 Letter to Pope from ADOC's General Counsel, Exhibit C to Pl's Compl. (Doc. No. 1).[1]

6. On or about October 22, 2002, Pope filed a Charge of Discrimination with the Equal

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[1] Plaintiff Pope was eventually promoted to the position of Correctional Officer II (Sergeant) on April 17, 2004.

Employment Opportunity Commission ("EEOC"), alleging discrimination on the basis of race and gender. Pl's Compl. (Doc. No. 1) at ¶ 17; EEOC Charge of Discrimination, at Exhibit D to Pl's Compl. (Doc. No. 1).

7. On or about December 4, 2002, Pope received a Right-to-Sue letter under Title VII. *See* 12/04/02 Dismissal and Notice of Rights at Exhibit E to Pl's Compl. (Doc. No. 1).

8. On February 21, 2003, Plaintiff filed the instant Complaint, wherein he alleges that Defendants discriminated against him based on race and sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. Pl's Compl. (Doc. No. 1). The named Defendants include: The State of Alabama, ADOC SPD, Jackie Graham as Director of SPD and Richard F. Allen as Commissioner of ADOC.[2] Pope's claims are based on Defendants' alleged discriminatory failure-to-promote him to the position of Correctional Officer II due to application of the no-bypass rule.

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[2] Pursuant to Defendants' motion (Doc. no. 45), the Court substituted SPD Director Jackie Graham and ADOC Commissioner Richard F. Allen for their predecessors originally named as Defendants in the Complaint. (Doc. no. 46).

9. On March 27, 2003, Defendants the State of Alabama, SPD and the Director of SPD filed their Answer to Pope's Complaint. (Doc. No. 8).

10. On April 2, 2003, Defendants ADOC and the Commissioner of ADOC filed their Answer to Pope's Complaint. (Doc. No. 9). In their respective answers, Defendants admitted and denied certain allegations and asserted various affirmative defenses thereto. (Doc. Nos. 8, 9).

11. On July 18, 2007, Plaintiff Pope filed a Motion for Partial Summary Judgement (Doc. Nos. 19, 20). Thereafter, the parties submitted their respective summary judgment briefs. (Doc. Nos. 32, 33, 36, 38).

12. On March 31, 2008, the Court denied Plaintiff's partial summary judgment motion. (Doc. No. 49).

13. The Court should dismiss Plaintiff's case under *GTE Sylvania*, in which the Supreme Court held that it is "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of the U.S.*, 445 U.S. 375, 386 (1980).

14. By his Complaint, Plaintiff Pope seeks

relief of the effects upon him from the implementation of the injunctions entered in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) and, in particular, application of the no-bypass rule. However, the no-bypass rule was mandated by the *Frazer* Court as part of several extensive remedial orders implemented to address discriminatory hiring and promotion practices by the State of Alabama and its respective agencies. Those injunctions have been subject to constant detailed scrutiny by the United States Justice Department for over 35 years.

15. To allow Plaintiff Pope to seek relief of any kind against Defendants for obeying the *Frazer* injunctions would be directly contrary to *GTE Sylvania* and the respect for the judicial process upheld in that case. Indeed, it would be particularly unjust and contradictory to respect for the judicial process to hold Defendants answerable for failing to defy court-ordered affirmative action whose strictures the State vigorously opposed and, when it lost, obeyed.

16. Additionally, the law under Title VII is in complete accord. The principle that liability cannot flow from obedience to a court decree has long been recognized under Title VII, both in the regulations issued by the EEOC and in the decisions of courts. *See* 29 C.F.R. § 1608.8 ("Parties are entitled to rely on orders of courts of competent jurisdiction . . . whether entered by consent or after contested

litigation, in a case brought to enforce a Federal, State or local equal opportunity law or regulation."). *See also Levitoff v. Espy*, 74 F.3d 1246, 1996 WL 14215 (9th Cir. 1996), *cert. den.*, 519 U.S. 927 (1996).

17. In sum, the collateral bar doctrine in *GTE Sylvania* operates as a complete defense to Pope's claims. Defendants had not authority to violate the mandate of the no-bypass rule provision of the *Frazer* injunction, regardless of any subjective belief that the legal foundation of the rule had eroded over time. To hold otherwise would create chaos by allowing parties, without orderly court review, to ignore injunctive orders based on a subjective assessment that an order is erroneous or no longer supported by the law. In this case, however, Defendants followed the established precedent of the courts by successfully seeking modification of the *Frazer* injunction through the procedure of orderly review established by Rule 60(b), Fed. R. Civ. P., and the principles embodied in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Clearly, Defendants ought not be put to a choice between penalties for contempt of court and a suit for damages.

18. Even assuming, *arguendo*, that either of Plaintiff's claims could survive *GTE Sylvania*, there are additional grounds for summary judgment on Plaintiff's claims against one or more of Defendants.

19. In particular, Plaintiff's Title VII claim

against Defendants Jackie Graham and Richard Allen in their official capacities (Count I) should be dismissed because it is functionally equivalent to his Title VII claim against their respective agencies. It is well-settled law that where, as here, the employer is a party to a Title VII suit, a Title VII claim against a state official in his or her official capacity is redundant and should be dismissed. *Blackledge*, 2007 WL 3124452, *9 (DeMent, J.) (dismissing Title VII claims against commissioner of state agency where agency was also named as Title VII defendant); *Willis v. Georgia Dept. Of Natural Resources*, Civil Action No. 5:05-CV-420, 2007 WL 2908458, *7 (M.D. Ga. Sept. 29, 2007).

20. Additionally, Plaintiff's § 1983 Equal Protection claim against SPD and ADOC (Count I) is barred by the Eleventh Amendment. *See Williams v. St. Vincent Hosp.*, Case No. 07-13263, 2007 WL 4294710, *1 (11th Cir. 2007) (state agencies are entitled to Eleventh Amendment immunity); *Washington v. Bauer*, 149 Fed. Appx. 867, *2 (11th Cir. 2005) (In regard to § 1983 suits against state agencies and state officials, in their official capacities, the Eleventh Amendment of the Federal Constitution generally prohibits such actions).

21. Plaintiff's § 1983 Equal Protection claim (Count II) against SPD Director Jackie Graham and ADOC Commissioner Richard F. Allen is also barred by the Eleventh Amendment to the extent

that Plaintiff seeks to recover monetary damages. Although a plaintiff may pursue claims for prospective injunctive relief against state officials in their official capacities, the Eleventh Amendment bars § 1983 suits for monetary damages (or their equivalent) against state officials named in their official capacities as defendants. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (holding that actions for monetary damages against a state official in his or her official capacity are essentially suits against the state and, thus, barred by the Eleventh Amendment); *Cross v. State of Ala., State Dept. of Mental Health & Mental*, 49 F.3d 1490, 1503 (11th Cir. 1995) (Eleventh Amendment barred § 1983 suit for monetary damages against Alabama state officials in their official capacities, since state was real party in interest).

22. Moreover, Plaintiff's request that the Court enter a declaratory judgment that the no-bypass rule violates Title VII, the Equal Protection Clause and § 1983 has been mooted by the *Frazer* Court's 2006 decision to terminate the rule. *See United States v. Flowers (Flowers II)*, 444 F. Supp. 2d 1192 (M.D. Ala. 2006) (Thompson, J.) (permanently terminating the no-bypass rule).

23. In addition, Plaintiff's general request that the Court order Defendants not to engage in racially discriminatory practices, *see* Pl's Compl. (Doc. No. 1) at §VI(b), does not support a claim for injunctive relief because it merely asks the Court to

order Defendant to "obey the law." "It is well-established in this circuit that an injunction demanding that a party do nothing more specific than 'obey the law' is impermissible." *Elend v. Basham*, 471 F.3d 1199, 1209-10 (11th Cir. 2006); *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999) ("As this injunction would do not more than instruct the City to 'obey the law,' we believe that it would not satisfy the specificity requirement of [Federal Rule of Civil Procedure] 65(d) and that it would be incapable of enforcement.").

24. Finally, Plaintiff's request that he be instated to the position of Correctional Officer II, *see* Pl's Copml. (Doc. No. 1) at §VI(c), is also moot because he was promoted to that position in April 2004 through the normal course of events. *See* Affidavit of ADOC Personnel Director Dora Jackson, Ex. A.

WHEREFORE, PREMISES CONSIDERED, THE Court should dismiss Plaintiff's Complaint or, in the alternative, grant summary judgment in Defendants' favor on all claims therein.

/s/ Alice Ann Byrne
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